



ONTARIO

REPORT
on
SUNDAY OBSERVANCE LEGISLATION

ONTARIO LAW REFORM COMMISSION



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on
SUNDAY OBSERVANCE LEGISLATION

ONTARIO LAW REFORM COMMISSION
1970

DEPARTMENT OF JUSTICE

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

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ONTARIO LAW REFORM COMMISSION

Sixteenth Floor
18 King Street East
Toronto 210, Ontario

TO THE HONOURABLE A. A. WISHART, Q.C.,
*Minister of Justice and
Attorney General for Ontario.*

Dear Mr. Attorney:

By reference dated August 15, 1969, the Commission was requested "to undertake a study and review of the Sunday Observance legislation in effect in Ontario in all of its aspects".

The Commission has completed its work and now submits its report.

PART I
INTRODUCTION

CHAPTER 1

ORGANIZATION OF THE PROJECT

S U M M A R Y

A. TERMS OF REFERENCE

B. HOW THE COMMISSION PROCEEDED

A. TERMS OF REFERENCE

Pursuant to the provisions of section 2(1)(d) of *The Ontario Law Reform Commission Act, 1964*, the Minister of Justice and Attorney General by letter dated August 15, 1969 requested the Commission "to undertake a study and review of the Sunday observance legislation in effect in Ontario in all of its aspects".

The following instructions were given concerning the nature and conduct of the project:

This [study and review] might include not only the sociological aspects of the matters dealt with by these laws but also the jurisdictional questions which naturally arise from any consideration of this problem.

In the course of your deliberations it might well be that public hearings or other expressions of public opinion might be desirable and helpful, since there have been many views expressed on this subject and I believe, in my experience, these views do represent many divergent aspects of our society.

My particular concern relates to the background and history of these laws and their present relevance within Ontario and for this reason, I am not as concerned with recommendations for changes as I am about the nature of the laws and their present application with regard to the changing nature of our society. It may well be that reform is desirable but I would not anticipate undertaking substantive amendments until I have the benefit of a study such as I have asked you and the Commission to undertake.

B. HOW THE COMMISSION PROCEEDED

In accordance with the instructions of the Minister of Justice and Attorney General, we organized an extensive research programme to investigate the historical, religious, economic, sociological, legal and comparative background of the law relating to Sunday observance. Professor Ronald G. Atkey of the Faculty of Law, University of Western Ontario was engaged as Counsel to the Project and to direct the research programme. Mrs. P. A. Black was appointed Project Secretary.

In order to give interested individuals and groups an opportunity to express their views and opinions, arrangements were made for the

holding of public hearings throughout the province. A notice was placed in seventeen Ontario daily newspapers and the *Ontario Reports* on November 24, 1969, describing the nature of the project and advising of an organizational meeting on December 9, 1969 in Toronto to outline further the scope of the inquiry and to receive suggestions from interested persons or groups as to the areas that should be covered. Fifteen persons or groups made preliminary suggestions and submissions at this meeting (see Appendix VI).

Copies of a memorandum to assist those preparing briefs (Appendix V) were distributed at the organizational meeting and sent with a letter inviting written briefs (Appendix IV) to approximately 400 organizations which might have an interest in the subject under review. Copies of the memorandum were also sent to any person and group requesting them.

While it had been our original intention to hold public hearings in twelve Ontario cities, the nature of the initial response to the call for briefs and oral submissions necessitated a scaling down of these plans. As a result, public hearings were held in five Ontario cities, for a total of twelve days: Toronto, February 23-25; Ottawa, March 9; London, March 16-17; Sault Ste. Marie, March 31; Hamilton, April 20-21; and Toronto, April 27-29. Notices of these public hearings were published in advance in the daily newspapers in the general area where the public hearings were held, including those communities where public hearings were originally planned but subsequently cancelled. Every effort was made to facilitate transportation arrangements for those persons who expressed an intention to appear but who did not reside in the communities where the public hearings were held.

In all, 154 written briefs were received (see Appendix VII) and 191 persons appeared and made oral submissions at the public hearings (see Appendix VIII). A magnetic tape record of the public hearings was taken in each city.

In addition to the 154 written briefs, over 100 letters and a number of petitions bearing the signatures of approximately 2,000 persons were received directly or forwarded to us by the Attorney General and his staff.

To all those members of the public who made submissions of any kind, we wish to express our gratitude.

The research programme included (1) a constitutional study by Professor W. R. Lederman, Q.C., Faculty of Law, Queen's University; (2) a religious study by Rev. Canon Maurice P. Wilkinson, Associate Secretary of the Canadian Council of Churches; (3) an economic study by Dr. Kenneth G. Hardy, School of Business Administration, University of Western Ontario; (4) an attitude and opinion survey by The Social Survey Research Centre, a subsidiary of Canadian Facts Co. Limited; (5) a behavioural study and survey by National Polling Trends Limited; and (6) a comparative study of foreign Sunday observance laws by Mr. Anthony M. Butler of the Ontario Bar.

Most of the information from foreign countries was obtained by letter through Canadian embassies, consulates or trade commissions in the various countries, or alternatively, through foreign embassies of the various countries in Ottawa or consulates in Toronto. Much of the information from selected states of the United States was obtained by writing to the Attorney General's Department in each state, or the City Attorney in the various cities in each state. The Attorneys General of seven other Canadian provinces provided detailed information as to the law and practices relating to Sunday observance in their jurisdiction. We are indebted to all the governmental officials, in Canada or abroad, who responded to letters of inquiry and provided probably the most complete and up to date inventory of Sunday laws and practices in existence. A summary of these materials appears in Appendix III.

During work on this project, certain studies on the subject of Sunday observance legislation in other jurisdictions came to attention and provided valuable insights into many of the problems faced. These studies included: (1) Report of the Select Committee on the *Lord's Day Act* in New Brunswick (1966); (2) Report of the Public Inquiry Commission Concerning Sunday Observance in Québec Pulp and Paper Mills (1966, Richard R. Alleyn, Chairman); (3) Report of the Departmental Committee on the Law on Sunday Observance in the United Kingdom (1964, The Rt. Hon. Lord Crathorne, Chairman); (4) Report of the Board of Inquiry on Sunday Observance in Tasmania (1967, Sir Philip Phillips, Chairman); and (5) Report of the Special Committee Appointed by His Excellency John A. Volpe, Governor of the Commonwealth of Massachusetts, To Consider The Laws Relative to Sunday Observance (1962).

The Sunday observance legislation project has presented us with many unique practical and theoretical problems involving a broad variety of situations and disciplines. In this respect, we believe that the study and review contained in the succeeding chapters is one of the most comprehensive ever undertaken on this subject.

The Commission and Counsel were ably and loyally assisted in this undertaking by Mrs. P. A. Black, Project Secretary, and by Miss Angela Innes who replaced Mrs. Black on October 1, 1970. Other members of staff assisting at various times were Miss Nicole Fortin, Mrs. Elaine Court, Mr. Arthur Vertlieb, Miss Barbara Barrett and Miss Pamela Hodgson.

We wish to record our appreciation to those persons who participated in the research programme, the members of the public who submitted briefs, wrote letters or made oral presentations at the public hearings, and to the loyal and efficient supporting staff of the Commission for their contributions to this achievement.

Special thanks and appreciation are tendered to Professor Ronald G. Atkey, Counsel to the Project. He has devoted a full year of his time and abundant talents to this important assignment. The report bears the stamp of his scholarship, imagination, industry and enthusiasm. We and the general public are much indebted to him.

CHAPTER 2

SUMMARY OF THE PRESENT LAW OF SUNDAY OBSERVANCE IN ONTARIO

S U M M A R Y

- A. THE FEDERAL LORD'S DAY ACT
- B. THE LORD'S DAY (ONTARIO) ACT
- C. OTHER ONTARIO LEGISLATION PERTAINING TO SUNDAY

The first laws on the subject of Sunday observance were decreed by the Roman Emperor Constantine in 321 A.D. They were enacted at that time in response to expressions of public opinion and existing practices in various parts of the Roman Empire.¹ Sixteen and a half centuries later, laws influenced by these early beginnings are still in existence in Ontario and throughout most of the western world. Expressions of public opinion today on these laws are no less frequent or intense than in early Rome.

As a background to the detailed study and review in the succeeding chapters, we consider it useful here to set forth a brief summary of the existing law in force in Ontario. This summary is intended to provide an initial clarification. A detailed legal analysis of the operative provisions of the various laws, including their interpretation and application by the courts, will be found in Chapter 8. The full texts of the two principal statutes, the federal *Lord's Day Act*² and *The Lord's Day (Ontario) Act*,³ are reproduced in Appendices IX and X respectively.

A. THE FEDERAL LORD'S DAY ACT

This Act is the principal statute prohibiting certain activities on Sunday throughout Canada. There are two main categories of prohibitions, one dealing with business and employment activities⁴ and the other with commercial sports and entertainment.⁵

The Act deals with the first category, business and employment activities on Sunday, in three ways: (1) by making it unlawful to *sell* or *purchase* any goods or real estate; (2) by making it unlawful to *carry on any business* of a person's ordinary calling or in connection with such calling; and (3) by making it unlawful for gain to *do work, business or labour*, or to *employ any other person to do work, business or labour*. There are very few prosecutions brought against persons who *purchase* goods or real estate on Sunday.

¹See Appendix I.

²R.S.C. 1952, c. 171, as amended by S.C. 1966-67, c. 69, s. 94.

³S.O. 1960-61, c. 50, as amended by S.O. 1965, c. 66, and S.O. 1968, c. 68.

⁴R.S.C. 1952, c. 171, s. 4.

⁵*Ibid.*, s. 6.

The second category of prohibitions deals with commercial sports and entertainment in three ways as well: (1) by making it unlawful to *provide* any performance or public meeting for a price; (2) by making it unlawful to *engage in* any performance or public meeting for a price or in any public game or contest for gain, prize or reward; and (3) by making it unlawful to *be present at* any performance or public meeting for a price or at any public game or contest for gain, prize or reward. Virtually all the modern prosecutions which are reported under this category are brought against persons who *provide*, as in (1).

The exceptions to these two main categories of prohibitions are as important as the prohibitions themselves. The first group of exceptions are those "provided in any provincial Act or law now or hereafter in force".⁶ This is the provincial "opt out" provision under which Ontario has enacted *The Lord's Day (Ontario) Act*, permitting (with limits) certain specified activities which would otherwise be prohibited by the federal Act. The other large group of exceptions are those coming within the broad term "work of necessity or mercy", for which the federal Act provides a list of twenty-four examples.⁷ Much of the case law involving the federal *Lord's Day Act* (to be discussed in Chapter 8) involves a judicial interpretation of this term. There is another general exception in the federal Act for passenger traffic on all railways.⁸

There are four additional categories of prohibitions in the federal Act, but of somewhat lesser importance today since prosecutions are rarely brought under them: (1) operating any pleasure excursion for passengers for a price;⁹ (2) advertising any performance or other thing prohibited by the Act;¹⁰ (3) shooting or using a gun either for gain, or in such manner or in such places as to disturb other persons in attendance at public worship;¹¹ and (4) selling or distributing (or bringing into Canada for sale or distribution) any foreign newspaper.¹² The provincial "opt out" provision applies only to the first of these four categories.

Enforcement of all the prohibitions in the federal Act is controlled by the provincial Attorneys General (or their lawful deputies) in their respective jurisdictions by virtue of the requirement that no prosecutions be commenced without their consent, which consent must be given within sixty days from the time of the commission of the alleged offence.¹³

Finally, the federal Act provides a series of minimum and maximum fines for offences, ranging from \$1-\$40 for individuals, \$20-\$100 for employers, and \$50-\$250 for corporations except on second and subsequent offences in which case it is \$100-\$500.¹⁴

⁶This phrase is included in both sections 4 and 6 of the federal *Lord's Day Act*, *ibid.*, as well as in section 7 prohibiting Sunday pleasure excursions for a price.

⁷*Ibid.*, s. 11(a) to (x). Subsection (x) was amended by S.C. 1966-67, c. 69, s. 94.

⁸*Ibid.*, s. 3.

⁹*Ibid.*, s. 7.

¹⁰*Ibid.*, s. 8.

¹¹*Ibid.*, s. 9.

¹²*Ibid.*, s. 10.

¹³*Ibid.*, s. 16.

¹⁴*Ibid.*, ss. 12-14.

B. THE LORD'S DAY (ONTARIO) ACT

Taking advantage of the "opt out" provisions in the federal *Lord's Day Act*, the Ontario legislation allows any municipality by bylaw to permit the following activities after 1.30 p.m. on Sundays: (1) any public game or sport;¹⁵ (2) any exhibition of moving pictures, theatrical performance, concert or lecture;¹⁶ (3) any horse race;¹⁷ and (4) any exhibition, fair or trade show.¹⁸

Each municipal council may decide whether to take advantage of this legislation by enacting the appropriate bylaw and it may permit all or merely some of the activities listed. With respect to the first two categories of activities above, the municipal council may specify a part or parts of the municipality in which the "permission" is to apply, may specify the times provided they are after 1.30 p.m., and may distinguish between activities within a category and permit different activities in different parts of the same municipality.¹⁹ With respect to the last two categories, a municipal council's only option is to permit these activities throughout the municipality after 1.30 p.m., or not at all.

An additional section in the Ontario legislation, not involving the municipalities, permits after 1.30 p.m. any concert, recital or other musical performance of an artistic and cultural nature anywhere in the province, as long as it is produced by a non-profit organization.²⁰

The provincial opting out from the federal Act is plenary in the sense that it not only permits a person to *provide, engage in or be present at* any or all of the above activities, but it permits a person to *do work, business or labour* or to *employ any other person to do work, business or labour*, in connection with such activities (subject of course to the enactment of the requisite municipal bylaw for the first four groups of activities listed above).²¹

Finally, any municipal bylaw enacted under the authority of *The Lord's Day (Ontario) Act* must provide for the regulation and control of the activities covered by such bylaw and may provide for the regulation and control of any matter or thing in connection therewith including the provision of fines of not more than \$300 for contraventions of such bylaw.²²

C. OTHER ONTARIO LEGISLATION PERTAINING TO SUNDAY

While *The Lord's Day (Ontario) Act* is the only Ontario statute having Sunday observance as its principal subject matter, there are

¹⁵S.O. 1960-61, c. 50, s. 1; amended by S.O. 1965, c. 66 and S.O. 1968, c. 68.

¹⁶*Ibid.*, s. 2.

¹⁷*Ibid.*, s. 1a.

¹⁸*Ibid.*, s. 5a.

¹⁹*Ibid.*, s. 1(2)(3) and s. 2(2)(3).

²⁰*Ibid.*, s. 5.

²¹*Ibid.*, ss. 1(1), 2(1), 1a(3), 5a(3) and 5.

²²*Ibid.*, s. 4. Also see Part XXI of *The Municipal Act*, R.S.O. 1960, c. 249, ss. 482-486.

a number of statutes containing ancillary Sunday provisions. The following is a summary.

*The One Day's Rest in Seven Act*²³ requires all hotel, restaurant or cafe employers in every city or town having a population of 10,000 or over to allow their employees at least twenty-four consecutive hours of rest in every seven days, and wherever possible "on a Sunday". Employers who contravene the Act are liable to a fine of not more than \$100.

A regulation promulgated under the authority of *The Game and Fish Act*²⁴ prohibits hunting on Sundays in most counties and districts south of the French and Mattawa Rivers. Fines are provided for contraventions.

*The Pawnbrokers' Act*²⁵ prohibits a pawnbroker from carrying on business on Sunday, and violations are subject to a fine of not less than \$20 and not more than \$40.

The Municipal Act provides authority for a municipality to enact bylaws providing for the closing of shops for a weekly holiday "during the whole of such day and until such time not later than 5 o'clock in the forenoon of the next following day".²⁶ A further section permits the municipal implementation of a rotational system for retail gasoline service stations which can require all or some of such establishments to be closed between 6 p.m. Saturday and 7 a.m. Monday, but with exceptions by means of permit.²⁷

Regulations promulgated under the authority of *The Liquor Licence Act*²⁸ provide different hours and conditions for the sale and service of liquor on Sunday from those on other days of the week.²⁹

²³R.S.O. 1960, c. 269.

²⁴S.O. 1961-62, c. 48, s. 83(22) and O. Reg. 409/69, s. 1.

²⁵R.S.O. 1960, c. 290, s. 25(1)(d).

²⁶R.S.O. 1960, c. 249; amended by S.O. 1961-62, c. 86, s. 43 by adding, *inter alia*, s. 379a(5).

²⁷*Ibid.*, s. 379b(a)(b)(c).

²⁸R.S.O. 1960, c. 218, s. 85(n); amended by S.O. 1961-62, c. 73; amended by S.O. 1965, c. 59.

²⁹Under O. Reg. 184/69, s. 3, liquor may be sold and served on Sunday in premises licensed as a dining room, dining lounge or club during the hours of 12 noon to 10 p.m. as long as served with a meal and the average receipts from the sale of liquor do not exceed the average receipts from the sale of food. From Monday to Saturday, the permitted hours are 12 noon to 1 a.m. in these premises, and the two conditions of service and sale do not apply. Liquor may not be sold on Sunday in premises licensed as a lounge or public house, but is permitted between 12 noon to 1 a.m. on Monday to Saturday. When the last day of December is a Sunday, the permitted hours in a licensed dining lounge, dining room or club are from 12 noon to 3 p.m. and from 5 p.m. to 1 a.m. of the following day where the licensee is so authorized by the Liquor Licence Board.

On Sunday, under a special occasion permit, liquor may be served (a) when the last day of December is a Sunday, during the hours from 5 p.m. to 1 a.m. of the following day at a function at which a meal is served (O. Reg. 407/67, s. 2); (b) between the hours of 12 noon to 10 p.m. at a function at which a meal is served and the receipts from the sale of liquor do not exceed the receipts from the sale of food (O. Reg. 184/69, s. 2); and (c) at a religious function in a religious institution of a denomination which does not observe Sunday as its Sabbath day (O. Reg. 187/65, s. 20, as amended by O. Reg. 34/67, s. 2). Also, liquor may be sold and served on Sunday under a special occasion permit between the hours of 12 noon to 10 p.m. at a function of an international, national or provincial convention at which no meal is provided (O. Reg. 184/69, s. 2).

*The Judicature Act*³⁰ prohibits service or execution of legal process on the Lord's day (except in cases of treason, felony or breach of the peace), and renders any such service and execution void and the person so serving or executing liable to the civil suit of the party grieved.

The Judicature Act,³¹ *The County Courts Act*,³² and *The Surrogate Courts Act*³³ all require their respective court offices to remain closed on "holidays", which term includes Sunday according to *The Interpretation Act*.³⁴ *The Division Courts Act*³⁵ requires the clerk to adjourn the Court "over any Sunday or holiday".

Finally, *The Industrial Standards Act*³⁶ makes provision for the promulgation of regulations giving effect to labour schedules drawn up by groups of employers and employees in designated industries and zones which establish, *inter alia*, the particular days in the week for the performance of labour and the rate of pay for any day that may be designated as a holiday.³⁷ Schedules now in force in various zones for the barbering, garment and construction industries typically contain either a prohibition of Sunday work or a requirement of overtime rates of pay for work performed on that day.

³⁰R.S.O. 1960, c. 197, s. 126.

³¹*Ibid.*, s. 91 (repealed and replaced by *An Act to Amend The Judicature Act*, s. 10, Bill 183 of the 3rd Session, 28th Legislature, which received Royal Assent and came into force on November 13, 1970).

³²R.S.O. 1960, c. 76, s. 6 (repealed and replaced by *An Act to Amend The County Courts Act*, s. 1, Bill 184 of the 3rd Session, 28th Legislature, which received Royal Assent and came into force on November 13, 1970).

³³R.S.O. 1960, c. 388, s. 16.

³⁴R.S.O. 1960, c. 191, s. 30(10).

³⁵R.S.O. 1960, c. 110, s. 14. (The title to this Act was repealed and replaced with "The Small Claims Courts Act", by *An Act to Amend The Division Courts Act*, s. 1, Bill 211 of the 3rd Session, 28th Legislature, which received Royal Assent on November 13, 1970 and which came into force on January 1, 1971.)

³⁶R.S.O. 1960, c. 186; amended by S.O. 1964, c. 46.

³⁷*Ibid.*, ss. 6, 7(1)(d), 7(1)(ea), 8, 12.

PART II

**HISTORY, BACKGROUND AND PRESENT
RELEVANCE OF SUNDAY LAWS
IN ONTARIO**

CHAPTER 3

HISTORY OF SUNDAY OBSERVANCE LAWS IN ONTARIO

S U M M A R Y

- A. PRE-CONFEDERATION LAWS
- B. LAWS IN FORCE IN ONTARIO IN THE PERIOD 1867-1903
- C. ORIGINS AND HISTORY OF THE FEDERAL LORD'S DAY ACT
(1906-PRESENT)
- D. THE HISTORY OF THE LORD'S DAY (ONTARIO) ACT
(1950-PRESENT)

A. PRE-CONFEDERATION LAWS

The Treaty of Paris in 1763 is a useful starting point in Canadian history in examining pre-Confederation Sunday observance laws relevant to the province of Ontario. By this treaty France ceded to Great Britain, among other possessions, what was then known as "Quebec" which included substantially all of the then largely uninhabited area now known as Ontario. George III's *Royal Proclamation* of 1763, following the conclusion of the Treaty, directed the governor to summon a general assembly, and with the consent of his council and general assembly to make "Laws . . . for the Public Peace, Welfare and good Government" of the colony "as near as may be agreeable to the Laws of England", and further provided for the inhabitants of the new colony having the "Enjoyment of the benefit of the Laws of our Realm of England".¹

No local Sunday observance laws were made by the governor and therefore, the Sunday observance laws of England applied in their full force and effect. These laws included four English statutes: (1) *An Act for the Better Observation of the Lord's Day, commonly called Sunday, 1677*;² (2) *An Act for the Further Reformation of Sundry Abuses Committed on the Lord's Day commonly called Sunday, 1627*;³ (3) *An Act for Punishing Divers Abuses Committed on the Lord's Day called Sunday, 1625*;⁴ and the *Sunday Fairs Act, 1448*⁵ (the first three statutes will be hereinafter referred to by their modern name "Sunday Observance Act", followed by the year of enactment).

The *Sunday Observance Act* of 1677 was the principal English statute on the subject during this period. It purported to secure the observance of the Lord's day by requiring all persons "to exercise themselves

¹ Much of the material in the early part of this section is taken from an essay by the Honourable W. R. Jakkett, President of the Exchequer Court of Canada, entitled "Foundations of Canadian Law in History and Theory", in *Contemporary Problems of Public Law in Canada* (1968, ed. Lang), pp. 3-30.

² 29 Car. 2, c. 7.

³ 3 Car. 1, c. 2.

⁴ 1 Car. 1, c. 1.

⁵ 27 Hen. 6, c. 5.

thereon in the duties of piety and true religion publicly and privately". The Act prohibited any tradesman, artificer, workman, labourer or other person from engaging in "any wordly labour or business or work of their ordinary calling" on that day except for "works of necessity and charity". Similarly, the Act forbade the showing or holding out for sale of any goods. Travelling was forbidden for drovers, horse-courers, wagoners, butchers and higlers (pedlars), and they were not allowed to go into any inn or lodge upon the Lord's day. Travelling for any person on a boat was prohibited on Sunday except upon some extraordinary occasion allowed by a Justice of the Peace. In addition to the exceptions for "works of necessity and charity", the Act permitted the preparing of meat in families or dressing or selling of meat in inns and restaurants, and also the crying or selling of milk before 9 a.m. or after 4 p.m. on Sundays. Offences were penalized by a fine of five shillings, and goods sold or displayed illegally on Sundays were subject to seizure and sale. If the offender was unable to pay the penalty provided, then he was to be set publicly in the stocks for a space of two hours. The poor in each parish were to receive the penalties, subject to the claim of common informers to receive up to one-third of the penalty in each case.

The *Sunday Observance Act* of 1627 prohibited travel on Sundays by horse carriers, wagon men, cornmen with carts, wainmen with wains and drovers with cattle, all under penalty of twenty shillings. Also it forbade butchers from killing or selling any animals or the meat thereof, under penalty of six shillings and eight pence. All of these activities were said to break and profane the Lord's day, thus causing the great dishonour of God and reproach of religion.

The *Sunday Observance Act* of 1625 was directed more at Sunday recreations for much the same reasons, prohibiting "meetings, assemblies, or concourse of people out of their own Parishes . . . for any sports or pastimes whatsoever". It specifically forbade bear-baiting, bull-baiting, interludes, common plays or unlawful exercises or pastimes within their own parishes. Fines were set at three shillings and four pence to be paid to the poor, and in default of fine and distress, the offender was to be set publicly in the stocks for three hours.

The *Sunday Fairs Act* of 1448 was the earliest English statute in force in Quebec as of 1763. It prohibited "all manner of fairs and markets . . . from all showing of any goods and merchandises", under penalty of forfeiture. Exceptions were made for "necessary victuals", and for the four Sundays in harvest. This prohibition was declared necessary to prevent "the abominable injuries and offences done to Almighty God and to his Saints" by virtue of activities associated with fairs and markets such as bodily labour, and the "horrible defiling of souls" resulting from "buying and selling, with many deceitful lies, and false perjury, with drunkenness and strifes . . ."

If there was any doubt about the adoption of the four English laws into the colony, it was soon dispelled by the passage in the English Parliament in 1774 of the *Quebec Act*,⁶ the most significant provision of

⁶*An Act for Making more Effectual Provision for the Government of the Province of Quebec in North America*, 1774, 14 Geo. 3, c. 83(Imp.).

which (for our purposes) continued the use of the criminal law of England.⁷

While the four English statutes referred to above never had been authoritatively held to be a matter of criminal law by an English Court at that time, the fact that they contained offences for profaning the Lord's day with penalties for their commission was probably sufficient to render them as such. In any event, they have been held by the Supreme Court of Canada in several cases since Confederation to be matters of criminal law in force in the colony of Quebec.⁸ While the *Quebec Act* in 1774 had delegated power to a newly constituted legislative council to make laws for the new colony, no local Sunday laws were ever enacted. Therefore, it is almost a certainty that the *only* Sunday observance laws in force prior to 1791 in that part of Quebec which is now Ontario were the laws of England.

The *Constitutional Act* of 1791⁹ created a legislative council and assembly in each of the two new provinces of Upper Canada and Lower Canada, "to make laws for the peace, welfare, and good government thereof". The new Legislature of Upper Canada passed its first statute the following year, entitled *An Act Introducing English Civil Law into Upper Canada*.¹⁰ The relevance of this Act for Sunday observance legislation was that it specifically replaced in Upper Canada the old "laws of Canada" (in many instances the laws in force in the area before the *Proclamation* of 1763 which were derived from the civil laws of France) with the laws of England at the time. Thus, even if there had been any local laws or ordinances in Quebec (Canada) relating to Sunday observance either before 1763 or between 1763 and 1792 and they were deemed to be part of the civil and not the criminal law, the laws of England in force in 1792 would have superseded and replaced them in that area which became Upper Canada and later Ontario.

If Sunday observance laws at that time, however, were regarded as criminal legislation (the more widely held view), then the criminal law in England as of 1774 would have been in force in Upper Canada by virtue of the *Quebec Act* of 1774 which had not been repealed by the *Constitutional Act* of 1791. However, the criminal law of England in 1774 had changed considerably by 1792 including passage of another *Sunday Observance Act* in 1780 (*An Act for Preventing certain Abuses and Profanations of the Lord's Day called Sunday*).¹¹ It was because of many of these changes that the Legislature of Upper Canada in 1800 saw fit to pass *An Act for the Further Introduction of the Criminal Law of England into Upper Canada*,¹² under which the criminal law of England as of 1792 was declared to be the criminal law of Upper Canada. The

⁷*Ibid.*, s. 11.

⁸See Fitzpatrick, C.J. and Anglin, J. in *Ouimet v. Bazin* (1911), 46 S.C.R. 502, at pp. 505 and 528, respectively; also see Fauteux and Kellock, JJ. in *Henry Birks & Sons (Montreal) Ltd. and Others v. City of Montreal and Attorney General of Quebec*, [1955] S.C.R. 799, at pp. 807-808 and 821-822, respectively; and Kerwin, C.J.C. in *Lord's Day Alliance of Canada v. Attorney-General of British Columbia*, [1959] S.C.R. 497, at p. 504.

⁹1791, 31 Geo. 3, c. 31 (Imp.).

¹⁰1792, 32 Geo. 3, c. 1 (U.C.).

¹¹1780, 21 Geo. 3, c. 49.

¹²1800, 40 Geo. 3, c. 1 (U.C.).

practical effect of this was to update the criminal law in Upper Canada from that prevailing in England in 1774 to that prevailing in 1792, bringing in the 1780 *Sunday Observance Act* and reaffirming that the English criminal law in general was the standard to be followed.

The English *Sunday Observance Act* of 1780, which was to continue in force in Ontario following Confederation, made it an offence for a keeper of "any house, room or other place . . . opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever . . . and to which persons shall be admitted by the payment of money, or by tickets sold for money" to operate his establishment at any time on Sunday, on penalty of two hundred pounds. Managers at such establishments were subject to a fine of one hundred pounds, and doormen fifty pounds. To prevent dubious circumventions of the above section, the Act provided that any house, room or place at which any tea, coffee or other refreshments were served on the Lord's day at greater prices than usual for weekdays would constitute a violation. Neither could the house or room or place of entertainment be financed by public subscription or contribution. The main purpose of the Act, as evidenced by the substantial fines, was to suppress the working class "disputing societies" which were seen by the government to be politically undesirable at that time.

Thus, in 1800 the law of Sunday observance in Upper Canada was virtually the same as in England under the *Sunday Observance Acts* of 1780, 1677, 1627 and 1625, and the *Sunday Fairs Act* of 1448. George S. Holmsted in his 1912 treatise on Sunday laws in Canada¹³ states that it was doubtful whether all these English statutes were adopted in their entirety in Upper Canada as a practical matter, particularly the provisions requiring people to exercise themselves in the duties of piety and true religion publicly and privately and to attend church. But the fact remains that as a matter of law, all the provisions of the early English statutes referred to were legally in force in Upper Canada if they were part of the law of England in 1792. This situation continued until 1845.

In Lower Canada, the *Quebec Act* of 1774 had continued the English criminal law in force at the time right up until 1805 when the Legislature of Lower Canada entered the field with *An Act to Prohibit the Sale of Goods, Wares and Merchandise, Wine, Spirits and other Strong Liquors on Sundays*.¹⁴ These provisions and additional prohibitions concerning tippling in public houses during divine service on Sundays¹⁵ were brought together in 1860 in the Consolidated Statutes of Lower Canada.¹⁶

The *Union Act*¹⁷ of 1840 reunited the provinces of Upper Canada and Lower Canada as a single province of Canada. It provided that all laws in force in Upper or Lower Canada at the time of the Union were to remain in force in the two parts of the new province of Canada, respectively, as if the *Union Act* of 1840 had not been passed and as if

¹³ Holmsted, *Sunday Laws in Canada*, 1912, p. 66.

¹⁴ 1805, 45 Geo. 3, c. 3 (L.C.).

¹⁵ 1827, 7 Geo. 4, c. 3 (L.C.).

¹⁶ 1860, C.S.L.C., cc. 22, 23.

¹⁷ 1840, 3 & 4 Vict., c. 35 (Imp.).

the two provinces had not been united, except insofar as such laws might be repealed or amended by the Legislature of the new province of Canada. This new Legislature was given powers to make laws for the peace, welfare and good government of the province of Canada as long as its laws were not repugnant to the *Union Act* of 1840, the unrepealed parts of the *Constitutional Act* of 1791, or to any Act of English Parliament which "by express enactment or by necessary intendment" extended to the provinces of Upper and Lower Canada, or to either of them or to the united province of Canada. Since it could not reasonably be maintained that any of the English Sunday observance legislation, including the most recent Act of 1780, had by "express enactment or by necessary intendment" extended to the province of Upper Canada or the province of Canada, the colonial Legislature in Canada in 1840 was free to make its own Sunday observance laws, whether or not they were in conflict with the English legislation. In the absence of any legislation by the new Legislature in the province of Canada, the English laws still prevailed.

The new Legislature of the province of Canada did not waste much time in entering the field for in 1845 it enacted *An Act to Prevent The Profanation of the Lord's Day, commonly called Sunday, in Upper Canada*.¹⁸ This statute reiterated most of the prohibitive Sunday observance provisions of the 1677 English legislation which had already been received in Upper Canada. It made it an offence for any merchant, tradesmen, etc., or other persons whatsoever to sell goods or real estate on Sunday or to pursue his ordinary calling on that day, as well as making it an offence to sell liquor in a tavern, or to revel, or publicly exhibit oneself in a state of intoxication, or to brawl or to use profane language in the streets or to hold, convene or attend any public political meeting on that day. Also, it was made an offence to play various sports, including skittles, ball, football, racket, or to gamble with dice or to run races on foot or on horseback or on other vehicles, or to go fishing or hunting or shooting on Sunday. It was unlawful also for any person to be in any exposed situation in any water within the limit of the city or town or within view of any place of public worship or private residence on the Lord's day. All sales and agreements for real and personal property made on the Lord's day were to be null and void. Fines for violations were set at ten pounds maximum and five shillings minimum for each offence, together with costs. Exceptions were made to the prohibitions for the conveying of travellers or Her Majesty's mail by land or water, selling drugs and medicines, and such other works of necessity or charity as the Courts might determine. Persons were allowed to use a gun or a dog on the Lord's day in defence of their property from any wolves or other ravenous beasts or birds of prey. Finally, the Act prescribed a limitation period of one month for prosecutions and contained a provision under which all fines levied would be distributed one half to the person laying the charge before the Justice of the Peace and the other half to the Treasurer of the District wherein the offence was committed.

¹⁸1845, 8 Vict., c. 45 (U.C.).

While this Act differed slightly from the English Act of 1677,¹⁹ it is fair to say that its general thrust and purpose was merely to reenact prevailing English legislation in force in Upper Canada at that time in a form which was more suited to the conditions and activities of Upper Canadians of that day. Nothing appears in the journals of the Legislature of the province of Canada indicating why such legislation was considered necessary. But it seems fairly certain that the 1845 Act of the Legislature of the province of Canada repealed and replaced by implication all the English Sunday observance legislation enacted in 1677 and prior thereto as applied to Upper Canada,²⁰ which certainly that Legislature had the power to do by virtue of the *Union Act* of 1840 and the *Constitutional Act* of 1791. The later English *Sunday Observance Act* of 1780 probably still remained in force²¹ in Upper Canada, notwithstanding the 1845 Act of the Legislature, because it dealt with one subject that was not touched in the 1845 Upper Canadian Statute, or its Consolidation in 1859.²² The English Act of 1780, it will be recalled, decreed that places of public entertainment and public debates for which admission was charged were to be deemed disorderly houses, and persons operating them or advertising them were subject to the stiff criminal penalty ranging from fifty to two hundred pounds fine for each offence.

Therefore, the 1845 Upper Canadian statute of the province of Canada (consolidated in 1859) together with the English *Sunday Observance Act* of 1780 were laws in force in Canada at the time of Confederation in 1867. The exact wording of section 129 of the *British North America Act*, 1867²³ is relevant here:

. . . [A]ll laws in force in Canada, Nova Scotia, or New Brunswick at the Union . . . shall continue in Ontario, Quebec, Nova Scotia, and

¹⁹The more important distinctions between the two Acts are discussed by Middleton, J. in *Rex v. Wells* (1911), 24 O.L.R. 77, at p. 79. Basically, the English Act penalized Sunday selling by forfeiture of the goods rather than fines, the class of persons enumerated within the selling prohibition was not as wide, the exception clause was stated only generally as "works of necessity and charity" with no examples, it did not condemn the purchaser as in the Upper Canadian Act and it did not include a prohibition against the Sunday sale of real estate.

²⁰There is no specific judicial authority for the proposition that the 1845 Act repealed and replaced by implication the English Acts of 1677, 1627, 1625 and 1448 although it is interesting to note the pattern of cases in Upper Canada at the time. *Bethune v. Hamilton* (1841), 6 O.S. 105 (U.C.Q.B.) was an action to enforce a Sunday contract in which the Court regarded the law as being determined by the provisions of the 1677 English Act. Yet in *Lai v. Stall* (1850), 6 U.C.Q.B. 506 and *Wilt v. Lai* (1850), 7 U.C.Q.B. 535, involving substantially the same issue nine years later, the Court in each instance regarded the law as being determined by the provisions of the 1845 Act of the Legislature of the province of Canada, and only a passing comparative reference was made to the 1677 English Act and the English cases applying it. See also *Houlston v. Parsons* (1852), 9 U.C.Q.B. 681 and *Crombie v. Overholtzer* (1853), 11 U.C.Q.B. 55.

²¹This view is confirmed in *Regina v. Barnes* (1880), 45 U.C.Q.B. 276, which was an application to quash a conviction under the Act of 1780 against the Royal Opera House in Toronto. Hagarty, C.J., after noting that down to 1845 the observance of Sunday in Ontario was regulated by the 1677 English Act, held that the 1845 Act left untouched the subjects dealt with in the English Act of 1780, and that the 1780 Act was fully in force, not having been superseded or repealed by the 1845 Act. He also held that the 1780 Act was part of the English criminal law introduced into Upper Canada in 1800.

²²*An Act to Prevent the Profanation of the Lord's Day in Upper Canada*, 1859, C.S.U.C., c. 104.

²³1867, 30-31 Vict., c. 3 (Imp.).

New Brunswick respectively, as if the Union had not been made; subject nevertheless . . . to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

B. LAWS IN FORCE IN ONTARIO IN THE PERIOD 1867-1903

There is no doubt that *An Act to Prevent the Profanation of the Lord's Day in Upper Canada*,²⁴ the 1859 consolidation of the earlier 1845 statute, continued as the law of Ontario after Confederation by virtue of section 129 of the *British North America Act*. It would appear also that the English Act of 1780 prohibiting public entertainments and debates for an admission fee was also continued in force.

The 1859 consolidation of the earlier 1845 statute was reenacted in slightly amended form by the Revised Statutes of Ontario, 1877, chapter 189, which repealed the former statute. It is apparent from an examination of chapter 1 of the Ontario revision of 1877 and of Schedule A therein²⁵ that the law officers of Ontario considered at the time that the whole of the consolidated statute of 1859 was within the legislative jurisdiction of the province, and not of the federal Parliament.

In 1886, the Parliament of Canada enacted the first revision of the Statutes of Canada. This was the first occasion upon which the federal Parliament took an opportunity to assert its position as to pre-Confederation Sunday observance legislation and whether by virtue of section 129 of the *B.N.A. Act* such legislation came under federal or provincial jurisdiction. It will be recalled that the early English Sunday observance legislation was generally regarded as criminal in nature although this point had not been judicially determined at that point.²⁶ If, of course, it was criminal law, it would be a matter of federal, and not provincial, jurisdiction by virtue of section 91(27) of the *B.N.A. Act*. Apparently the law officers of Canada took the view in 1886 that it was doubtful whether the 1845 Upper Canadian statute (as consolidated in 1859) fell within the federal or provincial jurisdiction. They did not sever the statute in any way as they did with some other pre-Confederation statutes. Instead, they listed the whole of the Upper Canadian statute on profanation of the Lord's day as doubtful, and omitted it entirely from the first federal revision.²⁷ The Ontario revision in 1877 being earlier, it may be surmised that the Ontario revisers had upstaged the federal revisers, although the matter was far from settled at that point.

²⁴1859, C.S.U.C., c. 104.

²⁵See p. 2276 of Chapter 1 of the 1877 Revised Statutes of Ontario.

²⁶It had been decided by Hagarty, C.J. in *Regina v. Barnes* (1880), 45 U.C.Q.B. 276, that the Act of 1780 was part of the English criminal law introduced into Upper Canada in 1800. But it was not stated there whether it was "criminal law" in the sense of section 91(27) of the *B.N.A. Act* and the federal distribution of powers, just that it was received as criminal law in 1800 by 40 Geo. 3, c. 1 (U.C.).

²⁷See Schedule B and Appendix 1 to the Revised Statutes of Canada 1886. Appendix 1 does not designate chapter 104 of C.S.U.C. 1859 as "Provincial", as it does in the cases of certain other Upper Canadian statutes; it simply refers to Schedule B where the statutes concerning which there is doubt are listed.

The Ontario Legislature in 1885 had added to the existing prohibitions Sunday passenger excursions by steamboat or railway for amusement or pleasure.²⁸ Obviously this was thought to be an extremely undesirable type of activity because the owner of any steamboat or railway convicted of violating the section was required to pay a fine of \$400 which was in stark contrast to the maximum fine of only \$40 under the principal Sunday observance legislation in the 1877 Ontario revision. The rationale provided by Lieut.-Col. A. F. Wood, member for North Hastings, who introduced the bill, was that Sunday excursions "interfered with the peace of people who wished to observe the day in a Christian manner".²⁹ He admitted that the bill created an anomaly in that a rich man would still be permitted to drive to his favoured church in his coach on Sunday while a poor man would be refused the privilege of riding on the streetcars on Sunday, but he thought the latter was better than having men connected with street railways compelled to work on Sundays.³⁰ Objections to the bill were raised by Hon. C. F. Fraser on the basis that it was class legislation "of the worst kind" having the effect of working entirely against the poor, and on constitutional grounds since the bill was directly concerned with railways and steamboats.³¹ However, these objections did not prevail³² against the desired Christian and labour principles which the bill purportedly espoused. Premier Mowat, after explaining that the Government was not a unit on this issue, denied that the bill would be against the interests of the working classes and asserted that the Christian members of the working classes were against Sabbath excursions.³³

In 1887, the 1877 revision of the Ontario *Act to Prevent the Profanation of the Lord's Day*, as amended in 1885 for Sunday passenger excursions, was repealed and reenacted as part of the 1887 Revised Statutes of Ontario.³⁴ There were some purely procedural changes as well.

There was added in 1896 to those occupational groups prohibited from selling or carrying on their ordinary trade or calling on Sunday the word "farmer".³⁵ Apparently this amendment was in response to a situation in western Ontario where a group of Seventh-day Adventists had been in the habit of working in their fields on Sunday and had been prosecuted but acquitted because of the wording in the prohibitory section which the Magistrate had interpreted as not including farmers.³⁶ Mr. Ferguson, who introduced the bill, was very careful to avoid throwing

²⁸1885, 48 Vict., c. 44 (Ont.).

²⁹Microfilm of Toronto Globe reports of Ontario Legislative Debates on 2nd reading, March 18, 1885.

³⁰*Ibid.*

³¹*Ibid.*

³²Premier Mowat had received a letter from the Governor General stating that any attempt to create a criminal distinction between travellers for pleasure and for business was surrounded by insurmountable difficulties, and that any other legislation on this subject should emanate from the provincial Legislatures. Microfilm of Toronto Globe reports of Ontario Legislative Debates on March 18, 1885.

³³*Ibid.*

³⁴*An Act to Prevent the Profanation of the Lord's Day*, R.S.O. 1887, c. 203.

³⁵1896, 59 Vict., c. 62 (Ont.).

³⁶Microfilm of Toronto Globe reports of Ontario Legislative Debates on April 1, 1896.

any bad reflection on the farming community in general, and the words of Mr. Haycock in the Legislature are even more instructive as to prevailing attitudes in Ontario at that time.

Mr. Haycock: I think it was quite a compliment to the farmers of the country that they were not included in the act when it was first passed. The moral standing of the farmers rendered it unnecessary. (Loud applause.) But if any section of the farming community have violated it they should be prosecuted.³⁷

Earlier that year, a deputation representing a citizens' committee had requested the Attorney General to change the cemetery regulations so as to permit Sunday burials, which were then prohibited except in cases of contagious diseases and under a doctor's certificate.³⁸ However, no action is reported as having taken place in response to this request, nor is it reported at what point Sunday burials became legal under the cemetery regulations.

In 1897, on the insistence of the Lord's Day Alliance, street railways and electric railways were forbidden to operate for passenger traffic on Sunday.³⁹ Exceptions were allowed where it was necessary to keep the tracks clear of snow or ice or for other acts of necessity or charity (not defined). Exempted from the prohibition were the operations of those companies which had previously run cars on Sunday or which had the right in their Charter to run on Sundays, or the Toronto Railway Company to the extent that Sunday operations had been sanctioned by the vote of the electors prior to the enactment. This law effectively curtailed the creation or expansion of the Sunday operations of any street car or tramway line in the province, therefore leaving Toronto, Ottawa and Hamilton as the only cities with any Sunday public transit at all.

The 1897 Revised Statutes of Ontario reenacted⁴⁰ the 1887 revision of *An Act to Prevent the Profanation of the Lord's Day*,⁴¹ including also the 1896 and 1897 amendments relating to farmers and street railways, respectively. The state of the law in Ontario at that point is perhaps most graphically illustrated by a reproduction of a poster which appeared in many public buildings and commercial premises about the turn of the century.

³⁷ *Ibid.*

³⁸ *Ibid.*, March 20, 1896.

³⁹ 1897, 60 Vict., c. 14, s. 95 (Ont.).

⁴⁰ R.S.O. 1897, c. 246.

⁴¹ R.S.O. 1887, c. 203.

SUNDAY LAWS

In Force in the Province of Ontario

PROHIBIT

1. **LABOR.** With certain exceptions this includes:
 - (a) **THE WORK OF LABORERS, MECHANICS and MANUFACTURERS.**
 - (b) **ALL FARM WORK**, such as **SEEDING, HARVESTING, FENCING, DITCHING.**
 - (c) **WORK ON RAILWAYS**, such as **BUILDING and CONSTRUCTION**, and also **REPAIR WORK**, except in emergencies, and **TRAFFIC**, excepting the forwarding of **PASSENGER AND CERTAIN FREIGHT TRAINS.**
 - (d) **ALL BUILDING, TEAMING, DRIVING FOR BUSINESS PURPOSES, THE WORK OF BAKERS AND BARBERS, Etc.**
 - (e) **THE WORK OF MUSICIANS AND PAID PERFORMERS OF ANY KIND.** Works of necessity and mercy excepted.
 2. **BUSINESS.** It is unlawful to **MAKE CONTRACTS** or to **BUY, SELL** or **DELIVER ANYTHING** on Sunday, including **LIQUORS, CIGARS, NEWSPAPERS, Etc.** Generally speaking the only exceptions are **DELIVERING PASSENGERS' BAGGAGE, MILK** for domestic use, and **SUPPLYING MEALS AND MEDICINES.**
 3. **ALL GAMES, RACES OR OTHER SPORTS FOR MONEY OR PRIZES**, or which are noisy, or at which a fee is charged, and the business of **AMUSEMENT** or **ENTERTAINMENT.**
 4. **ALL EXCURSIONS** for hire and with the object of pleasure, by **TRAIN, STEAMER** or **OTHER CONVEYANCE.**
 5. **ADVERTISING** in Canada, unlawful things to take place on Sunday, either in Canada or across the line.
 6. **IMPORTING, SELLING** or **DISTRIBUTING FOREIGN NEWSPAPERS** on Sunday.
 7. **ALL GAMBLING, TIPLING, USING PROFANE LANGUAGE**, and all other acts which disturb the public quiet.
 8. **ALL PUBLIC MEETINGS**, except in Churches.
 9. **HUNTING, SHOOTING, FISHING; also BATHING** in any public place or in sight of a place of public worship, or private residence.
- THE PENALTY IS FROM \$1.00 TO \$500.00**

THE GAME LAW

Of the Province makes Sunday a **CLOSE SEASON** for all **GAME** and **HUNTING** and **SHOOTING UNLAWFUL** on that day.

THE PENALTY IS FROM \$5.00 TO \$25.00⁴²



Several pieces of provincial legislation related to the Sunday question came into force in this period. In 1888, *The Ontario Shops' Regulation Act*⁴³ first permitted a municipal council by bylaw to close any class of shop on "any day of the week" but at a time not earlier than 7 p.m. on the day so designated. This time was moved back to 6 p.m. in 1942.⁴⁴ In 1951, an additional provision was added to the

⁴²Poster reproduction supplied courtesy of Mr. Earl Rosen of Toronto.

⁴³1888, 51 Vict., c. 33, s. 2 (Ont.).

⁴⁴S.O. 1942, c. 17, s. 5.

legislation (in 1913 it had been brought into *The Factory, Shop and Office Building Act*⁴⁵) which permitted a municipal council, on application of at least three-quarters of the shops in a class, to pass a bylaw closing that class of shop "on one particular day of the week during the whole of such day" and until 5 a.m. the next day.⁴⁶ These provisions were brought into *The Municipal Act* in 1961⁴⁷ as section 379a(3)(5) and the weekly closing provision was amended so that it was no longer necessary for a municipal council to have an application from at least three-quarters of the shops in a class before proceeding with the weekly closing bylaw.

The other related provincial legislation was that pertaining to bakeshops. Sunday work in bakeshops was first prohibited in 1897 in *An Act Respecting Shops and Places other than Factories*⁴⁸ as part of a broader effort to remove "sweatshop" labour conditions in bakeshops at the time. The provision was brought into *The Ontario Shops' Regulation Act*⁴⁹ later the same year and then into *The Factory, Shop and Office Building Act* in 1913⁵⁰ where it remained in slightly amended form until its repeal in 1964 by *The Industrial Safety Act*.⁵¹

In 1903, the superstructure of Ontario's Sunday observance legislation collapsed, for in *Attorney-General for Ontario v. Hamilton Street Railway Company*⁵² the Judicial Committee of the Privy Council declared that the whole of the 1897 *Act to Prevent the Profanation of the Lord's Day* was *ultra vires* the province of Ontario because, "treated as a whole", it was "criminal law" in the wide sense in which that term was used in section 91(27) of the *B.N.A. Act*. The words of Lord Halsbury in *Hamilton Street Railway* left little room for doubt that it was the entire legislative scheme as consolidated in 1897 that was to be struck down as unconstitutional.

This left an apparent vacuum in the field of Sunday observance in Ontario and in all the other Canadian provinces which had enacted legislation similar to that of Ontario. But the precise effect of the Judicial Committee's decision as expressed by Lord Halsbury was to wipe out all the Ontario legislation from 1877 forward, including the amendments relating to Sunday excursions, farmers and street railways. The pre-Confederation legislation of 1845, as consolidated in 1859, still continued in force in Ontario in its early form by virtue of section 129 of the *B.N.A. Act*. Thus in reality there was not a vacuum, and in fact the 1897 Ontario statute declared *ultra vires* was almost word for word the same statute that had been passed before Confederation in 1845, with the exceptions of the later provisions relating to Sunday passenger excursions, farmers and street railways, and certain minor procedural changes. The only real difference, apart from these three later provisions, was that the pre-Confederation statute could be changed, amended or repealed only by the Parliament of Canada, and not the Legislature of Ontario, since the field was now generally regarded constitutionally as a

⁴⁵ 1913, 3 & 4 Geo. 5, c. 60, s. 84(3) (Ont.).

⁴⁶ S.O. 1951, c. 23, s. 1.

⁴⁷ S.O. 1961-62, c. 86, s. 43.

⁴⁸ 1897, 60 Vict., c. 51, s. 40 (Ont.).

⁴⁹ R.S.O. 1897, c. 257, s. 39.

⁵⁰ 1913, 3 & 4 Geo. 5, c. 60, s. 70 (Ont.).

⁵¹ S.O. 1964, c. 45, s. 39.

⁵² [1903] A.C. 524.

matter of criminal law.⁵³ It was not until 1948 that the Parliament of Canada, at the request of the province of Ontario,⁵⁴ repealed⁵⁵ the Upper Canadian statute of 1845 (as consolidated in 1859) concerning the profanation of the Lord's day and the English statute of 1780 concerning places of public entertainment and public debates on Sundays, insofar as they were law in the province of Ontario. This was done apparently because there was no discretion as to prosecution given the Attorney General under the two pre-Confederation statutes (unlike section 16 of the present federal *Lord's Day Act*) thus rendering them potential vehicles for harassment and persecution by private citizens through laying of trivial charges.⁵⁶

If there was any doubt that the 1948 repeal of the pre-Confederation Sunday observance legislation in Ontario was not valid and effective, the revised *Criminal Code* which took effect in 1955⁵⁷ undoubtedly settled the matter. Section 8 of the Code, which was new, in effect repealed all pre-Confederation criminal law in force in any province when that province entered Confederation, whether the pre-Confederation law took the form of historically received English common law, or pre-Confederation colonial statutes or ordinances. As Chief Justice Kerwin of the Supreme Court of Canada put it, giving reasons for judgment in *Lord's Day Alliance of Canada v. Attorney-General for British Columbia*⁵⁸ in 1959, the effect of section 8 was that, henceforth in Canada, "There are . . . no criminal offences except those which are by enactments of the Parliament of Canada." Indeed, the Chief Justice specifically listed the old English Sunday observance statutes in question, making it plain that they were to be characterized as "criminal law" and thus were repealed for all parts of Canada by the new section 8 of the *Criminal Code of Canada*. Had Parliament not repealed the two pre-Confederation statutes in 1948 as applied to Ontario, section 8 of the new Canadian *Criminal Code*, taking effect from April 1, 1955, would have accomplished the same result. And section 8 does repeal any other pre-Confederation law criminal in character that theoretically might still have been in force in Ontario in 1955, such as the 1677, 1627 and 1625 *Sunday Observance Acts* or the 1448 *Sunday Fairs Act*.

All this, of course, is of relatively minor significance in the light of events leading up to and the enactment of the first federal *Lord's Day Act* in Parliament in 1906.⁵⁹

C. ORIGINS AND HISTORY OF THE FEDERAL LORD'S DAY ACT (1906-PRESENT).

As early as 1878 and 1879, resolutions had been moved in the House of Commons by Thomas Christie, M.P. for Argenteuil, that, in the interest of public morality and the physical well-being of all classes of

⁵³See *Rex v. Yaldon* (1908), 17 O.L.R. 179 (C.A.).

⁵⁴H.C. Deb. (Can.), 1948 (4th Sess.), Vol. VI, at p. 5358.

⁵⁵S.C. 1948, c. 58, s. 2.

⁵⁶H.C. Deb. (Can.), 1948, Vol. VI, at p. 5362.

⁵⁷S.C. 1953-54, c. 51.

⁵⁸[1959] S.C.R. 497.

⁵⁹S.C. 1906, c. 27.

the community, there be a strict and uniform observance of the Lord's day with respect to the closing and cessation of labour on canals, railways, and all departments of the federal public service including the Post Office department, save and except services of necessity.⁶⁰ Both resolutions were agreed to by the House. The resolution of 1878 was seconded in 1888 by John Charlton, Liberal Member for North Norfolk and one of the founders of the Lord's Day Alliance in Canada, who was later to introduce a number of Private Members' bills throughout his parliamentary career of thirty-three years: the first a bill in 1884 to prevent Sunday passenger excursions on steamboats and railways;⁶¹ the second a bill in 1890 generally "to secure the better observance of the Lord's Day";⁶² the third in 1891 as a modification of the previous year's bill;⁶³ and the fourth in 1892 which was a watered-down version dealing principally with the closing of canals, railways and newspaper sales.⁶⁴ Charlton also introduced a motion in 1893 to close the Canadian portion of the Columbian Exposition in Chicago on Sundays, but after long debate it was rejected.⁶⁵

While none of Charlton's bills ever became law, they attracted widespread publicity and considerable support in the House. His 1890 bill, as modified in 1891, contained six provisions which were very similar to the Ontario legislation in force at the time⁶⁶ such as prohibitions against labour, trading, horse-racing and other undesirable contests, frequenting inns and tippling, hunting, and fishing on Sundays. But the bills also contained prohibitions against the printing, publication and delivery of newspapers or journals on Sunday; prohibitions related to the closing of canals and post offices on Sunday; and a final provision restricting railway traffic on that day. Charlton's remarks in the House of Commons in 1885,⁶⁷ 1891⁶⁸ and 1892⁶⁹ provide a wealth of historical, religious and comparative background to Sunday observance practices throughout the world, but particularly in relation to the United States where moral decay had purportedly led to crass secularization on Sundays in many of the leading American cities. There is no doubt that his primary concern was a religious one—as reflected in his invocation of support from many of the leading Protestant and Roman Catholic clerics in Canada and the U.S.A., and in the preamble to his bills:

Whereas it is desirable, in the interests of religion and morality and public welfare, that better provision should be made for securing the observance of the first day of the week, hereinafter called the Lord's Day, as a day of rest. . . .

⁶⁰6 H.C. Deb. (Can.), at cols. 75-84.

⁶¹17 H.C. Deb. (Can.), at cols. 256-266.

⁶²29 H.C. Deb. (Can.), at cols. 1477-1484.

⁶³31 H.C. Deb. (Can.), at cols. 104; 747-776.

32 H.C. Deb. (Can.), at cols. 2936-2955.

⁶⁴34 H.C. Deb. (Can.), at cols. 1062-1083.

⁶⁵36 H.C. Deb. (Can.), at cols. 2217-2244.

⁶⁶R.S.O. 1887, c. 203.

⁶⁷17 H.C. Deb. (Can.), at cols. 256-264.

⁶⁸31 H.C. Deb. (Can.), at cols. 747-764.

⁶⁹34 H.C. Deb. (Can.), at cols. 1062-1076.

He was also concerned, however, about securing the working man one day's rest in seven as a matter of health and physiological well-being. It was during the debates in the House on these bills that arguments concerning the paradoxical relationship between civil liberties and Sunday observance laws began to be raised. For example, it was argued in 1885 that a great many persons might claim that it was their *right* to have Sunday excursions in order to enable them to obtain that recreation necessary to health and general well-being. Yet it was argued that this might trench on the liberty of the railway and steamship employees who might otherwise have a day of rest on Sunday. It was suggested that this was a question of compromise, and the benefits conferred by any legislation should not be less than the wrongs inflicted.⁷⁰

The main reason that Mr. Charlton's bills did not gain the support of the government at the time was not any major disagreement on the principles of the bills but their alleged unconstitutionality. Sir John A. Macdonald felt that the 1884 bill to prevent Sunday excursions was *ultra vires* since it did not declare the Sunday excursions to be crimes, but merely unlawful acts for which a civil action for damages could be brought. The Minister of Justice, Sir John Thompson, thought the 1891 provisions similar to the Ontario Sunday prohibitions were unconstitutional and he was instrumental in expunging them from Charlton's bill in Committee. As to the sections in the 1892 bill relating to Sunday newspapers, canals, railway traffic and Sunday excursions, for which offences violations were provided, Sir John Thompson admitted that Parliament had jurisdiction to enact them as matters of criminal law, but felt that at least the Sunday newspaper question should be left to the provinces for decision as a matter of sound policy. He was of the view that the whole subject of Sunday observance had been "sufficiently and amply dealt with by the Provincial Legislatures", and this seemed to be the position taken by the majority of the House, the result of which was that all Charlton's bills were talked out.

The Conservative governments of Thompson, Bowell, and Tupper (1892-1896) and the Liberal government of Sir Wilfred Laurier (elected in 1896) were able to put the matter off in this fashion until 1903 when the Judicial Committee of the Privy Council in effect struck down the whole superstructure of provincial Sunday observance laws in *Attorney-General for Ontario v. Hamilton Street Railway Company*⁷¹ by declaring the whole of the Ontario legislation to be *ultra vires* as criminal law.

This decision virtually confirmed the position taken by Charlton that it was Parliament's obligation, and not that of the provinces, to enact legislation securing the better observance of the Lord's day, if such legislation was indeed considered desirable. Laurier's government apparently still entertained some doubts on the constitutional issue, or at least it wanted to buy time, for in 1905 a draft provincial Sunday observance bill was submitted by the federal government to

⁷⁰Mr. O'Brien, M.P., 17 H.C. Deb. (Can.), at col. 266.

⁷¹[1903] A.C. 524.

the Supreme Court of Canada for an opinion. The Court, composed of five of its members, replied that the draft provincial legislation which would have prohibited on Sunday the performance of work and labour, transaction of business, engaging in sport for gain or keeping open places of entertainment, would be *ultra vires* a provincial Legislature and within the jurisdiction of the Parliament of Canada⁷² since it was indistinguishable from that struck down in *Hamilton Street Railway*. An attempt was then made to refer the matter for a second time to the Judicial Committee of the Privy Council, but the federal government's application for leave to appeal was refused. This set the stage for the introduction in the following year of the federal *Lord's Day Act* which was to become the principal Sunday observance legislation in Canada and which continues up to the present time.

Before considering the specific provisions of the federal Act introduced at that time, reference should be made to some of the forces outside of Parliament leading up to its introduction.

With the advent of the industrial revolution in Europe in the nineteenth century had come the growth of a movement originating in Geneva, Switzerland in the 1860's to ameliorate the condition of the working classes by protecting the Sunday day of rest, and at the same time to rescue the religious observance of Sunday from the neglect into which it had fallen throughout many parts of Europe.⁷³ This movement, called the International Federation for Sunday Observance, spread steadily throughout Europe, first to Germany, then to France. International congresses on Sunday rest were held in Geneva in 1876, in Berne in 1879, at the Paris Exposition in 1889 and in Berlin in 1890. Then a large-scale congress on Sunday rest was held in Chicago in 1893 as part of the Columbian Exposition. Delegates attended from Germany, France, the Netherlands and other European countries as well as from the U.S.A. and Canada. Representing the Lord's Day Alliance in Canada was none other than John Charlton, M.P., who assisted as a vice-president of the congress as well as conveying greetings from the General Secretary of the Alliance, Rev. W. D. Armstrong. Also listed on the Advisory Council to the Congress in 1893 were Charlton, Armstrong and six others including Sir Oliver Mowat, Premier of Ontario from 1872-1896. The papers presented at the Chicago Congress covered virtually the whole spectrum of Sunday observance: the physiological basis of Sunday rest; the economic and ethical value of Sunday rest; Sunday rest in specific industries such as oil, mining and railways; the effects of Sunday rest on character, habits, women, children, home and family life; the political and legal aspects of Sunday rest; and the religious aspects. Spokesmen included women, management and labour representatives as well as representatives from the Jewish community and the Roman Catholic Church.

One of the results of the Congress was an articulation of the following goals, which reflected both religious and labour purposes:

⁷²*In Re Legislation Respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 581.

⁷³The Sunday Problem. Its Present-Day Aspects, Physiological, Industrial, Social, Political, Religious (International Congress on Sunday Rest, Chicago – Papers, 1893), p. 9.

1. A more general and intelligent appreciation of the Sunday rest and of the duty of protecting it by wise and just laws:
2. A wider cooperation of Roman Catholics and Protestants in maintaining the Sunday rest:
3. A fuller recognition on the part of wage-earners of the efforts which Christian men and philanthropists are making to secure to them, as far as practicable, their right to the Sunday rest:
4. A better understanding of the peril to the weekly rest from such use of it on the part of wage-earners as robs others of their equal right to its benefit:
5. The manifested agreement of Christians of different denominations as to the divine authority of the institution, and the duty of so using it as to promote the spiritual as well as the physical well-being of man and society.⁷⁴

A second International Congress on Sunday Rest was held in the U.S. in connection with the St. Louis Exposition in 1904, and many of the same topics were dealt with in even greater detail.⁷⁵ Delegates from Canada included Rev. J. G. Shearer, General Secretary of the Lord's Day Alliance of Canada and Rev. T. A. Moore, Associate Secretary of the Alliance. Listed among the Advisory Council to the Congress were the Hon. George W. Ross, Premier of Ontario; Thomas Urquhart, the Mayor of Toronto; Hon. H. R. Emmerson, federal Minister of Railroads and Canals; Principal Gordon, Queen's University; Hon. Colin H. Campbell, Attorney-General of Manitoba; Hon. J. C. McCorkill, Provincial Treasurer of Quebec; Senator James McMullen of Mount Forest, Ontario; and many other distinguished Canadians.

This international movement of course was essentially the international affiliation of the Lord's Day Alliance movement in Canada which had come into being about the same time, and eventually proved to be one of the most effective legislative lobbies in Canada's history. The formation of the Lord's Day Alliance of Canada in 1888 was described by John Charlton, M.P. in the House of Commons as follows:

On the evening of Friday, 20th April, 1888, a conference of representative men from the different religious bodies was held in the City Hall, Ottawa, for the purpose of discussing the question of united effort in promoting the due observance of the Lord's Day. There were representative clergymen present from all the denominations, and among the laymen a number of Senators and Members of Parliament.

The Hon. G. W. Allan, Speaker of the Senate, was elected chairman of the meeting.

At this meeting it was agreed, on motion of Archdeacon Lauder, seconded by John Charlton, M.P.: 1.—To organize an Alliance for the protection and preservation of the due observance of the Lord's Day.

⁷⁴*Ibid.*, p. 18.

⁷⁵Sunday Rest in the Twentieth Century, (International Congress on Sunday Rest, St. Louis — Papers Jackson ed., 1905).

On motion of the Rev. Dr. Armstrong, seconded by Senator McKay: 2.—To issue a circular to the directors of the various Railway Companies, calling their attention to their duty in regard to the Lord's Day.

On motion of Rev. J. Scanlon, seconded by Dr. Thorburn: 3.—To appoint a Committee to examine into the legal aspects of the Sabbath question, and to report as to the possibility of obtaining additional legislation; this Committee to consist of Hon. Speaker Allan, Hon. John Macdonald, John Charlton, M.P., George Jamieson, M.P., Prof. Weldon, M.P.

On motion of Hon. J. Macdonald, seconded by Rev. J. Wood: 4.—To seek to educate public opinion with regard to Sabbath observance by means of the pulpit, the press, and petition.

On motion of Dr. Armstrong, seconded by Rev. H. Pollard: 5.—To ask the various religious bodies to appoint delegates who shall represent them in the Alliance.

The following officers were appointed:—President, Hon. Speaker Allan; Vice-Presidents, Hon. John Macdonald, John Charlton, M.P., Archdeacon Lauder, Hon. J. Macdonald (B.C.). These, with a committee of resident ministers, were to submit a constitution for adoption at the next annual meeting.⁷⁶

The following year, a committee was appointed to report as to the power of Parliament to legislate with reference to the Lord's day observance, and the following report was presented.

Resolved, That, in the opinion of this meeting, the Parliament of Canada is competent to enact laws to secure the better observance of the Lord's Day. Section 91, sub-section 27, of the British North America Act, empowers the Parliament of Canada to enact criminal laws. Parliament can, therefore, clearly bring Lord's Day legislation within the scope of this sub-section, by making breaches of the law, in such matters, misdemeanors. We are further of the opinion that the powers to make laws for the peace, order and good government of Canada, includes the power to secure the due observance of the Lord's Day by proper legislation. We are also of the opinion that legislation securing the better observance of the Lord's Day, in matters pertaining to general railway traffic, the management of the postal service, and the management of the railways and canals belonging to the Dominion, is, in the highest sense, necessary for promoting peace, order and good government in the Dominion of Canada.⁷⁷

The Alliance then struck a Committee comprised of Messrs. Charlton and Weldon to draft the bill which Charlton, with the support of the Dominion Synod of the Anglican Church and the Alliance, introduced in Parliament in 1890. The failure of this and succeeding legislation introduced by Charlton was noted earlier.

⁷⁶29 H.C. Deb. (Can.), at col. 1477.

⁷⁷29 H.C. Deb. (Can.), at col. 1478.

Following the failure of Charlton to convince the federal government of the day, the torch was picked up by the Reverend J. G. Shearer, a Presbyterian minister from Hamilton, who founded the Ontario Lord's Day Alliance in Hamilton and Toronto in 1895 and later became General Secretary of the Lord's Day Alliance of Canada from 1900 until 1906. He was the single greatest force behind the Alliance's efforts to secure the passage of the *Lord's Day Act* in Parliament in 1906.⁷⁸ During his tenure of office as General Secretary, the Alliance grew rapidly, spreading from under a hundred branches concentrated primarily in Ontario to over 600 branches in all of the provinces within a few years, and receiving the support of all major Protestant denominations and the cordial encouragement of the Roman Catholic hierarchy. The Anglican Archbishop of Montreal was honorary president until his death in 1906, when he was followed by the Archbishop of Toronto. In addition to Messrs. Charlton, Weldon and Christie, many other Members of Parliament were active in support, and the Leader of the Opposition, R. L. Borden, was a vice-president. The Alliance's periodical, the *Lord's Day Advocate*, had risen to a circulation of 40,000 by 1907,⁷⁹ with an estimated clientele by its own description of "perhaps 125,000 including, the most intelligent and influential of our citizens."⁸⁰

The growth of the Alliance coincided with the Privy Council's decision in *Hamilton Street Railway*, but it is fair to say that the judicial declaration of invalidity of the principal provincial Sunday observance legislation in 1903 increased the zeal with which the Alliance conducted its activities at the federal level. Immediately following the Privy Council's decision, the Alliance launched a massive campaign: the *Lord's Day Advocate* was put on a monthly basis; a "Lord's Day Week" (in cooperation with similar bodies in Britain and the United States) was planned for the second week after Easter in 1904; and more than twenty petitions were drawn up to be presented to both houses of Parliament at the next Session.⁸¹ The Alliance was temporarily stalled when the government decided to submit the draft provincial Sunday observance bill to the Supreme Court of Canada for an opinion in 1905.⁸² But when the Court ruled that the draft bill should share the same fate as the Ontario legislation in *Hamilton Street Railway*, and the Judicial Committee of the Privy Council refused leave to appeal, the federal government was compelled to come to grips with the matter in the face of the mounting pressure. The Alliance had secured the support of Archbishop Bruchési of Montreal and of organized labour, its financial receipts continued to increase and it had organized a most effective lobby in Ottawa which was intended to influence virtually all Members of Parliament including Prime Minister Laurier and the Minister of Justice, Charles Fitzpatrick.⁸³ It has even been suggested that private understandings must have been reached with the editors of some of the more important newspapers.⁸⁴ The Toronto

⁷⁸Waterman, "The Lord's Day in a Secular Society: A Historical Comment on the Canadian Lord's Day Act of 1906", (1965), 9 Can. J. Theology 108, p. 112.

⁷⁹*Ibid.*

⁸⁰*Lord's Day Advocate*, November, 1907, p. 7.

⁸¹Waterman, *op. cit. supra*, p. 113.

⁸²*Supra*, note 72.

⁸³Waterman, *op. cit. supra*, pp. 113-114.

⁸⁴*Ibid.*, p. 114.

Globe, for example, had been lukewarm in 1904, but came out strongly in support of the legislation sought by the Alliance in 1905 and 1906.⁸⁵

Bill 12 entitled *An Act Respecting the Lord's Day* was introduced in the House of Commons on March 11, 1906 by the Honourable Charles Fitzpatrick. The bill had been substantially drafted by the Lord's Day Alliance and included in a petition of the previous year.⁸⁶ After referring to the *Hamilton Street Railway* case, Mr. Fitzpatrick provided the following explanation:

By way of explanation I would like to say that in the action of the Attorney General of Ontario and the Hamilton Street Railway, the Privy Council, in July 1903, held that the Ontario Act to prevent the profanation of the Lord's Day, treated as a whole, was beyond the competency of the provincial legislature to make. It was therefore deemed advisable to make legislation by this parliament which undoubtedly has the power to legislate in the form in which this Bill is introduced. The Bill prohibits sales, the prosecution of ordinary work or business, excursions, games for prizes, the opening of places of public amusement for which an admission fee is charged, to advertise any performance or other thing prohibited by this Act. The provincial Acts now in force in any province shall remain in force.⁸⁷

On April 5, 1906, the bill was referred to a Select Committee of the House for intensive study, and to allow witnesses to make submissions. In moving second reading prior to his motion referring it to Committee, Mr. Fitzpatrick added further explanation:

This Bill is really intended to provide a day of rest for all, so that each man may be free to abstain from labour, and if he so desires, to give one day in the week to the service of his Creator. In my judgment it is always desirable to abstain from placing an individual in the position of being obliged to choose between his honest religious convictions and his personal gain. There are, of course, in this country great commercial interests which have to be considered, and we have also to bear in mind the needs of the great consuming class, and I feel that a careful examination of this Bill will show that they have not been overlooked; . . .

I know that among all classes Sunday is becoming more and more an accepted period for expeditions of some sort in pursuit of pleasure. I cannot say that personally I agree very much with that view of the day. This Bill is not intended in any way to facilitate or encourage these Sunday amusements. On the contrary it is intended to increase our regard for Sunday observance. It will be found, however, that its provisions in no way affect the right of any man to spend his Sunday in the open, in the fields or in the woods under the broad dome of Heaven, or in the public

⁸⁵Waterman, *ibid.*, refers to four leading articles in the Globe during the Alliance's campaign, all of which gave powerful support: Nov. 11, 1905; Mar. 16, 1906; April 2, 1906; July 9, 1906.

⁸⁶Waterman, *ibid.*, p. 114.

⁸⁷74 H.C. Deb. (Can.), at cols. 19-20.

parks; and facilities which now exist by way of steam or electric railway or by ferry may still be utilized for that purpose. But that which the Bill is intended to prevent, that which I sincerely hope it will prevent, is the open shop, the exploitation of the public by the organizers of excursions, which, in too many instances, are little less than carousals, and also the opening of places of public amusement for entrance to which a fee is charged. Legitimate recreation and amusement are in no way interfered with, but the business of amusement will be prevented and I am not aware that such business deserves greater consideration than any other business. Ferries such as that to St. Helen's Island, in the neighbourhood of Montreal, to the Island of Orleans, in the neighbourhood of Quebec, and to Toronto Island, in the neighbourhood of Toronto, or other similarly situated localities, are protected, but if there is any doubt on that point the terms of the Bill may be amended in committee so as to make this provision absolutely clear.

With respect to amusements, ball, lacrosse, or any other game will be just as lawful as it is now, and pleasure parks as such, not run as a business and for gain, can be utilized to the same extent as under the existing law. . . .

It has been suggested in some quarters that this is a mere parsons' Bill. Well, all right thinking people admit that the parsons are an important element in this community, who have an undoubted title to be heard and are in a position to speak with authority on legislation such as we are now considering. And I am free to admit that I was glad to solicit and obtain from that element the benefit of their views and advice on this matter. But this Bill does not proceed from a mere puritanical desire to maintain the strictly sabbatarian view or, as I have already pointed out, to rigidly prohibit legitimate forms of amusement. Apart altogether from the question of religion, the observance of one rest day in seven is a matter of great physiological advantage to all who are leading a strenuous life, and there can be no reasonable doubt that it would largely contribute to maintain and improve the physical and intellectual vigour of our people. One of the first obstacles in the way of legislation will be the religious convictions of some elements in our community; but, as the Archbishop of Canterbury pointed out during the course of a recent debate in the English House of Lords, it is not desirable for us to be too considerate of the wishes of alien immigrants who, as he justly said, while they are obtaining the benefits which this country is affording them, will not be subjected to undue hardship if they are obliged, in the public interests, to obey any rules which we, as a Christian community, find it necessary to lay down for the observance of the Sunday.⁸⁸

The bill became law in Canada only three months later on July 12, 1906. In the interim period, the Select Committee hearings and the debates in the House gave rise to some of the most acrimonious public discussions ever witnessed in Canada up to that time.

⁸⁸74 H.C. Deb. (Can.), at cols. 1010-1011; 1014.

The public hearings comprised most of the work of the Committee, which completed its task in less than two months. Submissions were received from transportation corporations, manufacturers and trading interests, labour interests, public health interests and religious interests. The transportation (railway, steamship and express) corporations' main complaint was that the prohibitions in the bill would inflict large economic losses on their industry. They were granted certain concessions in the form of amendments to the bill by the Committee after the steamship and express companies in particular had met with Dr. Shearer and Mr. R. U. McPherson, counsel to the Alliance (who were in constant attendance at Committee hearings) to see what exceptions to the general prohibition against carrying on business the Alliance would countenance.⁸⁹ Ultimately, those exceptions included the conveying of travellers, trains and vessels in transit when Sunday begins, loading and unloading merchandise and work by yard crews in the early morning or late evening, and railway freight traffic permitted by the Board of Railway Commissioners. However, the prohibition against Sunday passenger excursions for amusement or pleasure was maintained.

The manufacturing and trading interests, which included companies in mining, metallurgy, oil, chemicals, breweries, newspapers, pulp and paper, and cement, were concerned about the scope of the excepting clause (i.e., the examples of "works of necessity or mercy") relating to continuous process industries. They submitted a draft amendment, after having consulted with Dr. Shearer and receiving his assurance that the Alliance had no desire to interfere with the operation of blast furnaces,⁹⁰ and their amendments were accepted and appeared in the final Act in a form at least as favourable to them as their own amendment had been.

Labour interests played a surprisingly small part in the Committee hearings. The representative of the railway train service men in Canada reported that about 65% of his men were against the transportation clause in the bill, mainly because it would decrease the earning power of railroad employees or in some cases would cause freight business to pass to the Canadian railways' competitors to the south—a matter of dollars and cents. Also, it would increase the risk of accidents to freight employees by crowding them with overwork on the first two days of the week to remove the Sunday accumulation from the freight yards.⁹¹ However, the representative did say all his men favoured legislation guaranteeing them one day's rest in every seven. The Secretary of the Trades and Labour Congress of Canada, on the other hand, purporting to represent nearly all organized labour (estimated to be 150,000 workers) except the railwaymen, stated that his organization felt that the bill was fine as it stood, and he urged the Committee to adopt it with very little material amendment.⁹² The latter view was certainly more representative of organized labour which undoubtedly gave its support

⁸⁹See Select Committee on Bill No. 12, Respecting the Lord's Day — Minutes of Evidence, May 9, 1906, at pp. 196-208.

⁹⁰Waterman, *op. cit. supra*, pp. 117-118.

⁹¹Select Committee, *op. cit. supra*, April 24, 1906, at p. 119.

⁹²*Ibid.*, at p. 124.

to the Lord's Day Alliance more on economic than religious grounds.⁹³ Indeed, at least one member of the Select Committee, Mr. Ralph Smith who was a pro-labour Liberal M.P. for Nanaimo and a vice-president of the Alliance, regarded bill 12 essentially as a piece of labour legislation⁹⁴ notwithstanding its name, the religious tone of some of its provisions and the general principles espoused by the Alliance as its initial sponsor.

Public health interests were represented by Dr. Black, M.P. on behalf of one of the medical associations. His position basically was to support the bill and to illustrate "the immense peril to the health of the people if they do not observe one day in seven."⁹⁵ He then went on to quote Dr. Farre, an eminent medical authority in England giving testimony before a Committee of the British House of Commons on the observance of the Lord's day:

'Although the night apparently equalizes the circulation well, yet it does not sufficiently restore its balance for the attainment of a long life. Hence one day in seven, by the bounty of providence, is thrown in as a day of compensation, to perfect by its repose, the animal system. Physiologically considered, power saved is power gained, and the waste of power from every kind of excitement defeats the purposes of the day. . . .

This is said simply as a physician, and without reference to the theological question; but if you consider further the proper effect of real Christianity, namely, peace of mind, confiding trust in God, and good will to man, you will perceive in this source of renewed vigour to the mind, and through the mind to the body, an additional spring of life imparted from this higher use of the Sabbath as a holy rest.'⁹⁶

Later in his testimony, Dr. Black quoted Sir Benjamin Richardson, described as a modern authority in hygiene and public health, to the effect that the Jews were an example of that vigour of life and health that comes from the observance of a day of rest. He also pointed to the Scots:

There is probably no country in the world where the day of rest is so thoroughly observed as in Scotland, and there is hardly a country in the civilized world where the vigour of the Scotchman (sic) and his mental capacity has not forced itself.⁹⁷

to which remarks, some honourable members of the Select Committee were recorded as saying "hear, hear".

The positions of the various religious interests before the Select Committee not surprisingly created the greatest controversy. Certain Quebec

⁹³Waterman, *op. cit. supra*, p. 122, footnote 91 reproduces the following statement from the Industrial Banner, May, 1907: "Organized Labour strongly supported the L.D.A. in obtaining the passage of the Bill, not on religious but on economic grounds."

⁹⁴*Ibid.*, p. 122.

⁹⁵Select Committee, *op. cit. supra*, April 24, 1906, at p. 127.

⁹⁶*Ibid.*, at pp. 127-128.

⁹⁷*Ibid.*, at p. 128.

Members of Parliament, particularly Messrs. Bourassa and Lavergne, had claimed that the bill was an attempt on the part of Protestant Ontario to coerce Roman Catholic Quebec.⁹⁸ Indeed, the Quebec opposition reached such intensity at one point that the Mayor and City Council of Montreal passed a resolution deploring the bill and two weeks before the bill actually became law, Bourassa and others addressed a mass protest meeting of five thousand in the Champs de Mars.⁹⁹ However, this opposition was localized and to some extent undermined by the strong support of the bill by the Roman Catholic Archbishops of Canada in their statement to the Select Committee.¹⁰⁰

⁹⁸Waterman, *op. cit. supra*, p. 115.

⁹⁹*Ibid.*

¹⁰⁰Select Committee, *op. cit. supra*, April 25, 1906, at pp. 151-152, as follows:

... A weekly day of rest for mind and body is most conducive to, aye even necessary for, man's physical well-being. This is so fully known, and so universally recognized, as not to require any arguments in its support.

But man has spiritual as well as material needs; moral as well as physical works to perform. Whilst, to a certain extent, and within certain limits, there is no antagonism between the performances of these duties, yet freedom from the laborious, or engrossing pursuits of every day life, is necessary to enable one to adequately comply with the requirements of one's social, moral and spiritual nature. Without the Sunday rest the greater portion of the nation would be deprived, to a very large extent, at least, of the moral and humanizing effects of the home, of the opportunity of joining in public worship, or of participating in its elevating influences. The decay of individuals entails the eventual decay of the nation. Hence, the whole community is vitally interested in preserving the inviolability of the weekly day of rest.

Now, since neither man's physical, nor moral welfare is best subserved by absolute inaction or cessation from all health giving exercise and reasonable social intercourse, it follows that not every form of activity is forbidden on the Christian Sunday. But, broadly speaking, all unnecessary servile works, as well as forensic actions, and business transaction such as fairs, public auctions, and similar noisy forms of buying and selling are forbidden. Works of charity, however, and those of real necessity, even while servile, are permitted. All who profess the Christian religion are we believe, substantially in accord on these points. Practically, then, the people of Canada desire that the Sunday rest should be duly observed.

Owing to the industrial conditions of our present day life, and perhaps, more largely on account of the restless and eager pursuit after material advantages, encroachments, especially by large corporations and business establishments, are being made on the rest and sanctity of the Sunday. Under the plea of necessity, or the exigencies of conditions said to be needful for the successful establishment, or prosecution of certain industries, many employees are deprived of their Sunday rest, and of the consequent opportunities of sharing in the humanizing and spiritualizing influences afforded to others on that day. Not unfrequently these pleas of necessity have no substantial existence. Furthermore, in a Christian community, is it not preferable that the production of material wealth, for the benefit of a few individuals, should be restricted, rather than the nation should suffer by the degradation, and dechristianizing of its members. The state cannot make its citizens Christians, or purify their private lives, by Act of Parliament, we readily grant; but it has the power and the duty of restraining those who would force its people to forego their right to bodily rest on Sunday, with its opportunities for moral and spiritual improvements. Hence we cheerfully join with others of our fellow citizens, in urging on parliament the desirability of enacting such legislation as shall protect the rights of all in this matter, whilst not unduly interfering with the reasonable convenience of the community, nor the Christian liberty of the individual.

The major religious issue before the Committee and later in the House was the question of providing an exemption to the Sunday prohibitions for those who observed the seventh day of the week (Saturday) and actually refrained from labour on that day. While the original bill introduced by Charles Fitzpatrick had not contained such a clause, the Select Committee, after hearing a Mr. Goldstein on behalf of the Jews of Canada¹⁰¹ and considering the laws of other countries permitting such an exemption, adopted Mr. Goldstein's clause, following, by a vote of 5 to 4:¹⁰²

Notwithstanding anything herein contained whoever conscientiously and habitually observes the seventh day of the week as the Sabbath and actually refrains from work and labour on that day, shall not be subject to prosecution for performing work or labour on the first day of the week, provided that such work or labour does not disturb other persons in the observance of the first day of the week as holy time, and that the place where the same is performed is not open for traffic on that day.

The Seventh-day Adventists had asked for an even more sweeping exemption clause, but of course would have benefited by the Jewish amendment. In any event, the Lord's Day Alliance immediately began to work opposing the exemption clause. Before Mr. Goldstein's submission to the Committee was barely finished, Dr. Shearer was on his feet challenging him as to the number of Jews in Canada and drawing to the Committee's attention the fact that a certain factory in Montreal operated by Jews was running seven days a week.¹⁰³ Dr. Shearer did not spare the Seventh-day Adventists either, noting that there were only 1500 in Canada, 300 of whom were men, and of these not less than 50 being preachers, evangelists and book agents sent to Canada by the American Seventh-day church.¹⁰⁴ The statement filed by Dr. Shearer before the Committee on the same day on this question was even more illustrative of the Alliance's strong opposition:

The Jews and other Saturday-Sabbath-keepers have asked you to specially exempt them from the restrictions the Bill will impose upon all.

We desire earnestly to protest against the putting in of any such exemption. We feel that this is vital to the measure. In support of this our contention we would submit the following considerations: (1) The legislation in question in no way interferes with religious liberty. It leaves all perfectly free to observe Saturday (if Jews or Adventists) or Friday (if Mahommedans) or no day (if infidels), in religious worship and exercise. It does not require any one to observe Sunday in a religious manner. It simply protects the one day in the week as a Rest Day leaving all free to make such use of it as they choose, and to observe other days as holy days if they think they should. (2) In deciding upon Sundays

¹⁰¹ *Ibid.*, April 27, 1906, at pp. 185-190.

¹⁰² Lord's Day Advocate, June, 1906, p. 5.

¹⁰³ Select Committee, *op. cit. supra*, April 27, 1906, at p. 191.

¹⁰⁴ *Ibid.*

as the protected Rest Day the law simply gives effect to the will and practice of more than ninety-nine per cent of the Canadian people. And while we sympathize with even so small a minority in any temporal disability this may entail, yet such disability is quite unavoidable; and it is no new thing for people to have to endure financial loss or disadvantage because of religious or conscientious convictions. (3) To grant exemption to any section of the people on such grounds would be a departure for which there is no precedent in any existing Canadian Sunday law, and, so far as we have been able to ascertain, in the laws of any other British colony, or in any general Lord's Day Act of the Mother Country. (4) To grant such an exemption would in practice, in communities where the exempted classes live, destroy the very purpose of the Rest Day law, and mean an open Sunday. "The liberty of rest for each demands the law of rest for all." If some men may work greed can readily find ways to compel them to work. To illustrate, suppose in any community there were one or two per cent of people enjoying exemption and bent on using Sunday for business and work, every line of business being represented among them, hardware, dry goods, groceries, &c., and every trade, blacksmithing, masonry, carpentry, &c., and every line of manufacture; and suppose all of these claim the right of going on with their worldly work on Sunday, manifestly we would have a wide open town and no day of the week free from business. The price to the many, to the ninety-eight or ninety-nine per cent of the people is out of all proportion to the end sought, namely, to allow the one or two per cent to do what they say they think they ought. Will the few insist upon robbing the whole community of its Sunday privileges and that in the name of liberty. But it may be said conscience is a very sacred thing, people's honest convictions should be respected at all costs.

Not quite at all costs.

Consider for a moment, our Mormon friends conscientiously believe in polygamy. Our law forbids them to practice it. Yet we feel sure that our Jewish friends would not be willing to advocate throwing down the legal safeguards of monogamous marriage. Legislation must ever seek the greatest good of the greatest number.¹⁰⁵

The Roman Catholic Archbishops of Canada also had something to say to the Select Committee on this question:

The Catholic church has always held and thought that the Jewish Sabbath, with its rigorous ceremonial observances, and restrictions, has been superseded by the Christian Sunday. Consequently, not from the Mosaic Law, but from the Gospel dispensation does it derive its warranty, and the nature of its commands.¹⁰⁶

Outside the Select Committee, the Alliance's opposition was no less intense. It so happened that most of the Anglican dioceses were holding synods and Protestant churches were holding assemblies during the month

¹⁰⁵ *Ibid.*, April 25, 1906, at pp. 150-151.

¹⁰⁶ *Ibid.*, at p. 151.

of June, and at many of these Dr. Shearer and other representatives called for—and received—strongly worded resolutions calling upon the government to preserve the original bill and drop the new exemption clause added by the Committee.¹⁰⁷ Laurier's government itself was divided on the issue, and the long debate on the question in the House on June 27, 1906 saw party lines wiped out and provincial voting blocs disregarded.¹⁰⁸ While Laurier, Borden (Leader of the Opposition), Fisher, Brodeur and Monk supported the exemption clause, it was defeated by the narrow vote of 79 to 57, the opposition being led by Aylesworth (the new Minister of Justice succeeding Fitzpatrick who had gone to the Bench), Bourassa from Quebec and Sproule from Ontario.¹⁰⁹ This effectively killed any hopes the Jews and the Seventh-day Adventists had concerning a Sabbatarian exemption clause.

Much of the debate in the Select Committee and in the House was taken up with the question as to whether the various prohibitions in bill 12 should be capable of amelioration or variation by the provinces. The debate on this issue is especially important today because to a certain extent the legislative jurisdiction of the provinces is dependent on the wording of the "opting out" clause eventually adopted in the Act (see Chapter 10). The original bill introduced by Charles Fitzpatrick had provided in section 2:

It shall not be lawful for any person on the Lord's day, *except as provided herein or in any provincial Act heretofore passed*, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain, or to do or employ any other person to do on that day any work, business or labour. [emphasis added]¹¹⁰

Thus, the only exceptions allowed from this general prohibition (apart from works of necessity and mercy listed in the next section) were those contained in provincial legislation already in force. This would not include the 1897 Ontario legislation which had been declared *ultra vires* in *Hamilton Street Railway* since it was no longer "in force". The phrase was included apparently out of deference to existing non-criminal legislation in Quebec such as the *Notaries Act* which permitted the preparation of legal documents for a fee on Sunday, or legislation permitting the sale of goods for charitable purposes at the doors of churches on Sunday.¹¹¹

The prohibition in the original bill against Sunday games and performances where an admission fee was charged (section 5) and against Sunday passenger excursions for a fee (section 6) were absolute, and no exception was allowed for the continuation of existing provincial variances from this norm. However, there was a later section which purported to continue existing provincial laws respecting the Lord's day:

¹⁰⁷Waterman, *op. cit. supra*, p. 116.

¹⁰⁸*Ibid.*, as quoted from the Toronto Globe, June 28, 1906, p. 4.

¹⁰⁹*Ibid.*

¹¹⁰76 H.C. Deb. (Can.), at col. 5645.

¹¹¹Explanation rendered by Hon. Mr. Aylesworth in the House; see 76 H.C. Deb. (Can.), at col. 5649.

Nothing herein shall be construed to repeal or in any way affect the provisions of any Act respecting the Lord's day in force in any province of Canada when this Act is passed; and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act, the offender may be proceeded against either under the provisions of this Act or under the provisions of any other Act applicable to the offence charged.

This was amended slightly by substituting the words "any provision of any Act relating in any way to the observance of the Lord's day", and was included as part of the Act with virtually no debate, and has continued to the present time. However, there was certainly no provision in any of sections 2, 5 and 6 for exceptions to be provided by provincial legislation enacted in the *future*, thus foreclosing further direct provincial involvement in the legislative scheme of things.

Early in the debate in the House it was moved by Camille Piché (St. Mary's, Montreal) that section 2 be amended by substituting the words "now or hereafter in force" for the words "heretofore passed".¹¹² Mr. Piché argued that this was necessary as a recognition that certain aspects of Sunday observance laws were within provincial jurisdiction as matters relating to property and civil rights in the province such as the behaviour of professional men, relations between citizens, labour standards and the sale of realty and personalty. He also suggested that his amendment would be wise politically since it would eliminate much of the rigidity in the bill's main prohibition.

The Minister of Justice, Mr. Aylesworth, first rejected the proposed amendment for the reasons stated following:

Just a word with regard to the proposed amendment of my hon. friend from Montreal (Mr. Piché). Its effect would be far reaching indeed. It would destroy all practical benefits from the clause under consideration. It would in fact be delegating, if we had the power to delegate, the whole question of dealing with this subject to each one of the several provincial legislatures. As it is now worded, the clause recognizes existing legislation on the subject. It does not profess to interfere with things, which, by existing legislation, are permitted. This general question of declaring what shall or what shall not be an offence against the criminal law as regards the non-observance of the Lord's day, has been, by the highest tribunal, declared to be within the functions of this parliament. We ought not to shirk our responsibilities. We ought not to say, by any form of words or any side wind, that we will seek to put that responsibility upon the different provincial legislatures and let them legislate nine or ten different ways upon the same matter. As to existing laws, the considerations are very different, but as to future laws this parliament ought to legislate and not leave the question any longer in doubt (sic).¹¹³

¹¹²76 H.C. Deb. (Can.), at col. 5647.

¹¹³76 H.C. Deb. (Can.), at col. 5651.

He then went on to state that it was the intention of those who framed the bill that persons in the future desiring exceptions to the prohibition should be required to come to Parliament, and not the provincial Legislature, to get them.¹¹⁴

Notwithstanding the rejection of the amendment, Piché and other prominent Members of the House including Bourassa and Borden continued to hammer away at the reluctance of the government to allow future provincial exceptions or variations in provincial fields of jurisdiction. While Laurier reluctantly continued to maintain that as a legal matter only the federal Parliament could legislate effectually on the question, Aylesworth's position began to soften as reflected in his following statements, made the evening before Bourassa's protest meeting in the Champs de Mars in Montreal:

But, having been concerned in the argument and having heard the judgment [in *Hamilton Street Railway*], I think I can say that the gist of the whole judgment, as given by the Lord Chancellor, was that the province had, by that particular legislation, infringed upon the domain of the criminal law, and that so far as a province chose to legislate on this subject in other respects and did not put their legislation in the form of declaring something to be a crime which heretofore had not been a crime within the province, it was perfectly competent for the province to so legislate.¹¹⁵ . . .

It is certainly within the jurisdiction of a provincial legislature to legislate on all questions relating to property and civil rights, and as long as they do not encroach upon the domain of criminal law I can see no reason why they should not legislate validly as to Sunday observance.¹¹⁶

Mr. Piché then moved his amendment again on June 29 in a slightly different form so that the substituted words were:

. . . Now or hereafter in force regarding matters coming within the classes of subjects enumerated in section 92 of the British North America Act.¹¹⁷

Aylesworth accepted the amendment,¹¹⁸ rationalizing it constitutionally in this fashion:

That is by no means delegating our legislative power to a provincial legislature, it is simply saying that we do not choose to declare that thing to be criminal or unlawful which a provincial legislature has, so far as that province is concerned, either in the past or may in the future, declare to be a right of a citizen of that province.¹¹⁹

¹¹⁴76 H.C. Deb. (Can.), at col. 5654.

¹¹⁵77 H.C. Deb. (Can.), at cols. 6271-6272.

¹¹⁶*Ibid.*

¹¹⁷77 H.C. Deb. (Can.), at col. 6590. The amendment originally suggested by Piché that day was "... now or hereafter in force regarding matters coming within the exclusive powers of provincial legislature", 77 H.C. Deb. (Can.), at col. 6569, but he later changed it at the suggestion of Borden.

¹¹⁸77 H.C. Deb. (Can.), at col. 6602.

¹¹⁹77 H. C. Deb. (Can.), at col. 6592.

Aylesworth's political rationale was perhaps more revealing:

I am, speaking for myself, not only not displeased, but very pleased indeed, that my hon. friend from St. Mary's has proposed the amendment which he has presented to this committee. It is a recognition of what I think very properly may be, and ought to be—a recognition of the co-ordinate rights, within their own jurisdiction, of the provincial legislatures to legislate upon this subject. We have, at different stages in the political history of this Dominion, heard a great deal from time to time upon the question of provincial rights; and it has been, and it is the pride of the political party to which I belong, as it is my personal pride, regarding myself as a humble member of it, to be ardent advocates of the principle of provincial rights. I therefore personally am glad indeed to see in this statute, as I should be glad to see in every statute which this parliament might pass, recognized to the full the right of the provincial legislatures to legislate upon any question which was within their jurisdiction. That is the effect and force of this amendment, and it seems to afford a means by which this measure will be, at all events, made, if not more acceptable at least less disagreeable, to the people of the province of Quebec.¹²⁰

Laurier was also content to accept the amendment since it would leave the question of Sunday sales and business to be regulated in accordance with local custom, and he firmly believed that no province other than Quebec (in respect of a few specific activities) would take advantage of the provision to diminish in the slightest the restrictions contained in the federal Act.¹²¹ Borden, on the other hand, would have preferred to see the Sunday sales and business prohibitions (section 2) not subject to provincial variation if the prohibitions against games and entertainment (section 5) and passenger excursions (section 6), or shooting (section 8) could have received the benefit of such an amendment which had not been the case to that point.¹²²

As for Bourassa, the Piché amendment did not go far enough despite the position taken by the Quebec press that the amendment would enable the Quebec Legislature to do away with the effective clauses of the federal Act.¹²³ Like Borden, he wanted games, entertainments, parks and excursions to be subject to provincial law on Sundays, but he thought the matter could best be handled by making the whole federal Act subject to adoption by each provincial Legislature before it went into force in that province.¹²⁴ This was rejected by a large majority of the House. Borden attempted to have section 5 relating to prohibitions against Sunday games, entertainments, etc., for a fee made subject to provincial variations, but his amendment was rejected by the government on the ground that the Lord's Day Alliance had insisted that the prohibition be absolute if fees were to be charged, the customs of Quebec being untouched if there were no fees.¹²⁵

¹²⁰77 H.C. Deb. (Can.), at col. 6563.

¹²¹77 H.C. Deb. (Can.), at cols. 6601-6602.

¹²²77 H.C. Deb. (Can.), at cols. 6596-6598.

¹²³77 H.C. Deb. (Can.), at col. 7310.

¹²⁴77 H.C. Deb. (Can.), at col. 7326.

¹²⁵77 H.C. Deb. (Can.), at cols. 7356-7358.

It was the Senate which eventually persuaded the government that provincial variations should be allowed in respect of games, contests, entertainments, etc., for a fee (section 5) and passenger excursions for a fee (section 6). Over the protestations of some of the Senators who were members of the Lord's Day Alliance, the two sections were amended by the Senate by adding the clause "except as provided in any provincial Act now or hereafter in force."¹²⁶ This was done apparently to secure the support and cooperation of the people of Quebec.¹²⁷ There was some suggestion that the matter had been privately agreed to in the Liberal caucus of Members and Senators on the evening of July 9, 1906 before the matter reached the floor of the Senate.¹²⁸ In any event, the day after the Senate amendment, Aylesworth accepted the amendments in the House without a fight,¹²⁹ much to the delight and relish of Borden and Bourassa. The Piché amendment in respect of the prohibition against Sunday sales and business, which had read "except as provided in any provincial Act now or hereafter in force regarding matters coming within the classes of subjects enumerated in section 92 of the *British North America Act*" was amended by the Senate to read "except as provided in any provincial Act *or law* now or hereafter in force".¹³⁰ The rationale for the addition of the words "or law" was provided by Senator Forget from Quebec who explained that without the change the common law of Quebec might be ousted so far as its application to Sunday observance was concerned. The new wording was also extended to the exception provision in sections 5 and 6, and was adopted by the government in the House.¹³¹

The clause "except as provided in any provincial Act or law now or hereafter in force" still appears in sections 4, 6 and 7 of the present federal *Lord's Day Act*, relating to the same matters as were contained in the three provisions which were part of the 1906 Act.

The Senate during the debate suggested additional amendments to the Act. The one that surprised the government the most was the last-ditch effort to change the name to "*An Act respecting Sunday*" and to substitute the term "Sunday" for "Lord's Day" throughout the Act. The following extracts from the Senate debates are instructive as to this issue:

Hon. Mr. POWER—I move that the word "Sunday" be substituted for the words "The Lord's Day" wherever they occur in the Bill. The expression "Lord's Day" is one which is never used in ordinary conversation, or in business. It is never used even by clerical gentlemen except when speaking in their official capacities from the pulpit, or on some similar occasion, and every one knows just what Sunday means. We ought to follow the language of the law, which is supposed to be the language of everyday life. Then there is another point. The day which has been selected as the day of rest and to be observed as such is Sunday. The great majority of the

¹²⁶ Sen. Deb. (Can.), 1906, at pp. 1193-1196.

¹²⁷ Sen. Deb. (Can.), 1906, at p. 1193.

¹²⁸ Sen. Deb. (Can.), 1906, at p. 1163. Also see Sen. Deb. (Can.), 1906, at p. 1214.

¹²⁹ 77 H.C. Deb. (Can.), at cols. 7667-7668; 7683-7684.

¹³⁰ Sen. Deb. (Can.), 1906, at pp. 1162-1164.

¹³¹ 77 H.C., Deb. (Can.), at cols. 7667-7668.

population are Christians, and Christians who believe in Sunday as being the day to be observed; but there are certain classes of the population who look upon Saturday as the Lord's day. Every one knows what Sunday is, and recognizes that Sunday is the first day of the week. I have spoken to a number of members of this honourable House, and also to some gentlemen outside, and all appeared to be in favour of making the change, that the name which is generally applied to the day should be applied to it in the Bill. . . .

Hon. Mr. McMULLEN—It would be a great risk on our part to introduce this amendment. In the other House this expression, "The Lord's Day" has been associated with the Bill in all its different phases. Every petition that has been sent here has been for legislation for the better observance of the Lord's day. I see no necessity to change the word. We had better let it stand as it is.

Hon. Mr. CHOQUETTE—I quite agree with the amendment. In the French version, the word used in the title is Sunday. The Lord's day, in French, does not mean Sunday at all. The word *Dimanche* is understood everywhere. The translation is bad from beginning to end—even the title is bad. I quite agree with the amendment, and think it ought to be accepted. . . .

Hon. Mr. MITCHELL—Every day is the Lord's day; the old-fashioned Sunday is good enough. That is what it has been called by our forefathers.¹³²

Hon. Mr. SULLIVAN— . . . I think [the term Sunday] is unchristian and not in accord with the Bill at all. Sunday is a day of heathen ordination, and only used by Teutonic and Scandinavian nations: but there is one day which stands above all others and it is the day of the Lord. The Bill as worded now, differs so materially from the commandment that we should be ashamed to pass it. I think where you follow the will of God all through you will do what is right. . . .¹³³

Although the amendment passed the Senate by a vote of 31 to 13, it was rejected in the House by Aylesworth who stated that the term "Lord's Day" was a recognized legal expression which had received legislative sanction in Great Britain for over two hundred years and which was preferable to the term Sunday; in any event the two had the same meaning.¹³⁴

The other notable amendment suggested by the Senate was the new provision (now section 16) that no prosecution under the Act be commenced without leave of the Attorney General of the province in which the offence was alleged to have been committed. The limitation period for a prosecution to be launched was also increased from thirty to sixty days to allow time for leave to be obtained. In introducing the amendment Liberal Senator Kerr of Toronto provided the following explanation:

¹³²Sen. Deb. (Can.), 1906, at pp. 1159-1160.

¹³³Sen. Deb. (Can.), 1906, at pp. 1224-1225.

¹³⁴77 H.C. Deb. (Can.), at cols. 7664-7666.

It will be observed . . . that there are some very heavy penalties to be imposed upon corporations and companies of various kinds. Necessarily these penalties are large in order to ensure the strict enforcement of the Act. At the same time the Acts which are prohibited are of such a varied character and may be done and committed under such circumstances as to expose parties to unnecessary prosecutions amounting to persecution. Under the circumstances, I take it that this is a proper case in which to provide some protection for the parties accused, so that they may not be unfairly harassed and annoyed, and so in point of fact it shall only be where there is a just cause or where a *prima facie* case can be made for a just cause that the prosecution can be undertaken at all. . . .

In selecting the Attorney General of the province in which the offence is committed as the one who should be satisfied, I have done so in view of the fact that, in every province the Attorney General is the one charged with seeing to the administration of justice, and the enforcement of the law, and therefore it is to him naturally and reasonably and properly that the application should be made. In the discharge of his duty, he can see that protection is given both to the accused, where there is not a proper case made out, and to the complainant wherever a proper case can be shown to justify proceedings. This is not a new policy.¹³⁵

Despite vigorous objections that the amendment would in effect destroy the principle of the bill and result in few prosecutions, the amendment carried the Senate by a vote of 32 to 19,¹³⁶ with the support of most of the Liberal Senators. When it reached the floor of the House the next day, it received the support of the government and was adopted as part of the Act. Laurier provided the rationale:

I would like the House to remember that this is an Act which we intend shall be received by the people with favour everywhere, and therefore it is necessary that it should not be made an instrument of persecution whereby informers could go about spying on people to see if they could not be brought before the courts. In order to prevent men going about trying to persecute people for trivial offences, and have no prosecution taken except for some grave offences, it is advisable to require the consent of the attorney general. Let me call attention to what might take place at any moment. Suppose there should be a strike in any great centre, in which thousands of men might be engaged, the feeling of resentment among these men, which we can well understand, might lead to numbers of them making complaints against a company for any trivial offence. In this way the sense of the community would be shocked; and instead of having the law respected, we would have it hated. It is obvious that we should endeavour to prevent this law being made an instrument of persecution but be rather a law for the good behaviour of the people.¹³⁷

¹³⁵Sen. Deb. (Can.), 1906, at p. 1201.

¹³⁶Sen. Deb. (Can.), 1906, at p. 1206.

¹³⁷77 H.C. Deb. (Can.), at cols. 7687-7688.

Borden felt that the insertion of the new section would mean that the provisions of the Act could not practically be enforced, and the Act would become a dead letter. The Attorney General's discretion under the Act, in his view, was not necessary except perhaps in cases involving heavy penalties; normally, however, complainants should be allowed to pursue the ordinary procedures for summary conviction offences.¹³⁸ Bourassa, on the other hand, was delighted because the new clause further shifted the machinery under the Act to the provinces. The following exchange between Bourassa and Aylesworth is instructive on this:

Mr. BOURASSA.

What I proposed and what I should have been satisfied with was that the legislatures of the several provinces should have their word to say as to the operation of this law. Now, we remit it to the attorney general of each province.

Mr. AYLESWORTH. Only the enforcement of the law.

Mr. BOURASSA. It comes to the same thing, because the enforcement is the payment of the penalty, and if the penalty is not paid the law is not enforced. . . .¹³⁹

A further justification for the discretionary clause was provided by Aylesworth in response to Borden's argument that prosecutions under the Act should be proceeded with in the same manner as ordinary summary conviction cases:

It is manifest surely that in the great majority of offences punishable by summary conviction, there is an individual who is wronged, and the wrong is not to the general public [as with offences under the *Lord's Day Act*] but specially to some individual.¹⁴⁰

In any event, the new clause was accepted by the House without a vote. It has continued in existence up to the present time, with only one minor amendment¹⁴¹ in 1948 to allow for leave to be granted by the lawful deputy of the Attorney General as well, an amendment requested by the government of Quebec.¹⁴²

Other amendments of the Senate, related to examples of works of necessity and mercy in section 3 and more favourable to transportation interests including clauses that would have permitted the carrying on of the express business and the individual movement of railway cars (once loaded) and the loading or unloading of grain laden vessels on the Great Lakes on Sunday, were rejected by the members of the House¹⁴³ who were obviously less impressed by the submissions of the transportation lobby than the honourable Senators had been.¹⁴⁴

¹³⁸ 77 H.C. Deb. (Can.), at cols. 7686-7687.

¹³⁹ 77 H.C. Deb. (Can.), at col. 7689.

¹⁴⁰ 77 H.C. Deb. (Can.), at col. 7692. Words in square brackets are added to supply proper context of remarks.

¹⁴¹ S.C. 1948, c. 58, s. 1.

¹⁴² 264 H.C. Deb. (Can.), at p. 5358.

¹⁴³ 77 H.C. Deb. (Can.), at cols. 7668-7670.

¹⁴⁴ Waterman, *op. cit. supra*, p. 119, quoting from the *Lord's Day Advocate*, July 1906, p. 12.

Not all of the other sections of the original bill appeared in the final enactment. An inquisitorial section permitting the police to enter and search premises where violations of the Lord's day were suspected had been quietly dropped in the Select Committee.¹⁴⁵ At the insistence of organized labour and after considerable debate¹⁴⁶ concerning employees who had to work on Sundays in exempted industries, present section 5 was added prohibiting anyone from requiring any employee in the communications, industrial process or transportation industries to work on the Lord's day unless the employee was allowed twenty-four consecutive hours without labour during the next six days of the week. Also the list of examples of works of necessity in the original bill, as exceptions from the general prohibition against Sunday selling and business was further refined and expanded to twenty-four in number, ranging from work in connection with divine worship to operations connected with the making of maple sugar and maple syrup in maple groves. All these twenty-four examples have continued to present day in their original form with only one minor amendment respecting freight traffic.

The bill finally received Royal Assent and became law on July 13, 1906, to come into force on March 1, 1907.¹⁴⁷ There had been many statements in the House as to the intended principle of the bill, not the least of which were the explanatory remarks of Charles Fitzpatrick in introducing it for the first time on March 11, 1906 or on second reading on April 3, 1906. However, perhaps the most significant statements in this respect were those of Prime Minister Laurier on the first day of debate in the House of Commons following the return of the bill from the Select Committee.

What is the principle of the Bill? If Sunday legislation has any meaning at all, and if it can have any basis at all, it is to give sanction to the divine precept that Sunday shall be made a day of rest and that there shall be no work on that day. If it has not that basis, what basis can it have? The basis of all Sunday legislation, not only in the different provinces of this country, but in every country where there has been Sunday legislation has been the recognition of the Christian precept that there should be a day of rest in the week. Now, if that is the recognition of the principle, what is the principle? The principle is that you should abstain from work on Sunday; the principle of legislation is to give sanction to the precept that there should be no work on Sunday; and, therefore, if you are logical at all, you must lay down the recognition of the principle that there should be no work on Sunday, and then you have simply to provide for the exceptions, because, from the most ancient times, it has been recognized that, with every disposition to observe the day of the Lord and to keep the Sabbath holy, it is impossible not to have some kind of work, and therefore in the law as it has been explained by the Saviour himself, He has recognized that from the law as laid down by Moses there must be

¹⁴⁵ *Ibid.*, p. 120.

¹⁴⁶ 76 H.C. Deb. (Can.), at cols. 5758-5786; also 77 H.C. Deb. (Can.), at cols. 6660-6663; 7682-7683; also Sen. Deb. (Can.), 1906, at pp. 1190-1193.

¹⁴⁷ S.C. 1906, c. 27, s. 16.

some exception and some work allowed on Sunday, and He Himself gave an example of what work might be allowed and was allowed. The world has developed a great deal since those days, and in our modern days, under our present civilization, the exceptions, which were few and far between a few generations ago, have now to be multiplied, and the difficulty with this legislation is to provide for the further exceptions which our modern civilization has made necessary. That has been the object of this Bill. . . .

I say, . . . that the very basis of any legislation of this kind must be to give the civil sanction, the sanction of the positive law to the moral law and the divine law. That is the basis which I lay down, and upon which this measure proceeds. But this measure, while it lays down this principle, does not go into the application of that principle. The law does not provide that a man on Sunday shall be obliged to go to church, shall be obliged to wear certain garments, to do certain things upon this line and that; the liberty of the subject is not interfered with in that respect, and a man can do on the Sabbath whatever he pleases to do.

There is no exception to his liberty except this, that he is not allowed to work. Now, that is the divine precept, and that is the precept which was incorporated in this Bill, that is not to allow work except under certain circumstances, which are specified, and which may be large enough or not large enough—I am not prepared to say that—but if they are not large enough they ought to be improved. The principle of the Bill is absolutely as it ought to be, giving the sanction of the positive law to principles which we all acknowledge, which he himself acknowledges, and providing only for certain exceptions to that general principle. . . .

Now, the secondary principle of this Bill, in my estimation, is perhaps as important as any other part of it, and it is this, to provide that every labouring man shall have a day of rest. That is the corollary to the first principle of the Bill, and that is the reason why we have introduced this legislation. We must remember that there are hundreds of thousands of men in this country who earn their living by daily labour, by working for masters, and we desire that it shall not be in the power of the Master to force them to work on Sunday unless he gives them an equivalent on some other day of the week. Is not that a most commendable principle, and is it not in the judgment of every man in this House and out of it, and of every working man in the country?

. . . ¹⁴⁸

Aylesworth openly asserted in the House that Christianity was recognized as constituting part of the law of Canada and that in essence the Act was designed to protect the Christian Sabbath as had been the case with earlier English Sunday observance statutes.¹⁴⁹ This statement, together with Laurier's remarks, is ample proof of the fact that the Act was primarily religious in purpose, and that secular

¹⁴⁸ 76 H.C. Deb. (Can.), at cols. 5638-5639, 5642.

¹⁴⁹ 76 H.C. Deb. (Can.), at col. 5623.

objects were sought or allowed only insofar as they were compatible with Christianity. The sabbatarian exemption clause, for example, was considered incompatible with the protection of the Christian Sunday and was defeated.

The other principal feature of the Act was the extent to which it eventually permitted the provinces to participate in the legislative framework of Lord's day regulation. The decision of the Judicial Committee of the Privy Council in *Hamilton Street Railway* in 1903 had implicitly thrust upon Parliament the apparent obligation to legislate in this field, if Canadians were going to have their Christian Sunday effectively protected. The Lord's Day Alliance saw to it that Parliament did not shirk its duty, notwithstanding that the government would have preferred to have left the matter in the hands of the provinces.¹⁵⁰ The Alliance actually drafted most of bill 12 introduced in the House of Commons in March of 1906. While most of the operative prohibitions in the bill were eventually enacted with some minor amendments, and additional exemptions for certain works of necessity, mounting pressure from Bourassa, Piché and some of the other Quebec members and also from the Opposition led by Borden forced the government to alter the absolute nature of the general prohibitions by allowing for provincial variations. The purpose of the bill was still preserved intact but its provincial "opt out" aspects contained in the phrase "except as provided in any provincial Act now or hereafter in force" and in the prosecutory discretion resting in the provincial Attorneys General made its eventual impact on Canadian society somewhat less rigorous than it might otherwise have been if enacted in its original form. Yet in involving the provincial governments in this way, it gave some substance to the political and practical view that Sunday observance laws were better determined at the local level and that, notwithstanding the decision in *Hamilton Street Railway*, Sunday observance was a field of concurrent jurisdiction as a constitutional matter. The wisdom of this approach has undoubtedly been borne out by developments in Canadian federalism since that time.

In any event, the Lord's Day Alliance, while they would have been happier without any provincial "opting out" provisions, generally felt they had achieved what they had set out to do, and following the coming into force of the Act on March 1, 1907 began to pursue its general enforcement. Less than two years after the Act had been in force, the General Secretary of the Alliance was able to report the following to the International Congress on the Lord's Day in Edinburgh, Scotland:

REV. T. ALBERT MOORE, Toronto, reported: Canada, under the guidance and stimulus of its Lord's Day Alliance, secured from its Dominion Parliament, in July of 1906, an Act regulating the observance of the rest of one day in seven. Not without a struggle was the victory won in a country where so many hailed from Sabbathless lands and so many were indifferent to the value of the day. On the 1st of March 1907 the Act came into force, and already it has restored the weekly Rest-Day, with the privileges it carries with it, to

¹⁵⁰The view of Laurier, 77 H.C. Deb. (Can.), at col. 6445.

80,000 workmen, out of the 150,000 who before were deprived of their Sabbath. Besides this, 100,000 or more copies of the sensational American Sunday newspapers have gone out of circulation in Canada since then. Moral suasion also has received a great impetus through the coming into effect of such beneficent legislation. The great corporations that a few years ago refused to discontinue unnecessary Sunday labour listen to the remonstrances addressed to them and reduce it to a minimum. The results during the short operation of the Act have been striking and encouraging. In the Province of Ontario, to mention one example, whole communities have experienced the change from the bustle and noise of labour to the quiet and restfulness of the Sabbath. In 1907 over twenty-five per cent. of the cheese factories did work on Sunday; in 1908 less than five per cent. did such work. In many other industries there has been given relief. So it is in other provinces of the Dominion. But "there is land yet to be possessed." There are questions that still give great concern, such as the persistent effort of Greeks, Italians, Americans and others to do business in confectionery and other shops; the determination of some industrial concerns to do all kinds of work on Sundays; the steady, positive, never-ceasing purpose of the great transportation companies to do any work they like, on land or water, in yard or along the line, whether according to law or not. The enforcement of the law is now the question. But public sentiment and conscience have been aroused in the interests of the weekly Rest-Day; the churches, Protestant and Catholic, are strongly sympathetic; and active measures are taken to diffuse information and quicken interest in the subject among all classes of the community, and especially among the newcomers from everywhere that pour into the broad territories of the Dominion.¹⁵¹

The *Lord's Day Act* of 1906 has gone through three consolidations, in 1906,¹⁵² 1927¹⁵³ and 1952,¹⁵⁴ with only a renumbering of sections, and has been amended only twice. The first amendment, already referred to, was in 1948¹⁵⁵ and consisted of two sections, the one providing that consent for prosecution could be given by the Deputy Attorney General of the province as well as the Attorney General, and the other repealing the pre-Confederation legislation still in force in Ontario.¹⁵⁶ The other amendment was in 1966¹⁵⁷ and was a consequential amendment in the *National Transportation Act*¹⁵⁸ which repealed section 11(x) of the *Lord's Day Act* which permitted any "work of necessity" connected with rail freight traffic approved by the Board of Transport Commissioners, and substituted the following:

¹⁵¹The World's Rest-Day (Thirteenth International Congress on the Lord's Day, Edinburgh, 1908; Robert Mackenzie ed. (1909), pp. 203-205.

¹⁵²R.S.C. 1906, c. 153. In subsequent consolidations, section 4 relating to the Act coming into force on March 1, 1907 was dropped.

¹⁵³R.S.C. 1927, c. 123.

¹⁵⁴R.S.C. 1952, c. 171.

¹⁵⁵S.C. 1948, c. 58.

¹⁵⁶The pre-Confederation laws repealed were *An Act to Prevent the Profanation of the Lord's Day, in Upper Canada*, C.S.U.C. 1859, c. 104, and *An Act for Preventing certain Abuses and Profanations on the Lord's Day, called Sunday*, 1780, 21 Geo. 3, c. 49.

¹⁵⁷S.C. 1966-67, c. 69, s. 94.

¹⁵⁸S.C. 1966-67, c. 69.

11.(x) any work that the Canadian Transport Commission, having regard to the object of preventing undue delay, deems necessary to permit in connection with the freight traffic of any transportation undertaking.

The purpose of this amendment was to substitute the Canadian Transport Commission for the disbanded Board of Transport Commissioners for Canada, and to allow a declaration in respect of *any transportation undertaking* (which would include interprovincial trucking), not just railways as in the repealed section.

The only other federal legislation of any direct relevance to Sunday observance passed subsequent to 1906 was the *Weekly Rest in Industrial Undertakings Act* enacted in 1935.¹⁵⁹ This Act, together with the *Minimum Wages Act*, 1935¹⁶⁰ and the *Limitation of Hours of Work Act*, 1935,¹⁶¹ attempted to give substance to draft labour conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Pact of the Treaty of Versailles, 1919 which Canada had ratified. It purported to require every employer in any industrial undertaking to grant a day of rest of at least twenty-four consecutive hours in each period of seven days, to be granted *wherever possible on the Lord's day* and simultaneously to the whole of the employer's staff. Exceptions were to be provided by regulation, having "special regard to all proper humanitarian and economic consideration", and where the day of rest was not Sunday the employer was required to post notices in his establishment making known the days and hours of rest. Section 5(2) of the *Lord's Day Act* which had excepted from a similar protection in section 5(1) of that Act all those working less than eight hours per day, was repealed, thus extending the one day's rest in seven protection to all employees in communications, industrial process, and transportation, whether full-time or part-time.

However, that same year, the Act, together with the two others purporting to give effect to the International Labour Conventions, were submitted to the Supreme Court of Canada for a determination of their constitutional validity. The six members of the Court were equally divided on the question,¹⁶² and an appeal was taken to the Judicial Committee of the Privy Council where Lord Atkin in his famous "Labour Conventions" judgment¹⁶³ declared them *ultra vires* the Parliament of Canada. The principal ground upon which Lord Atkin relied was that the federal Acts all were in relation to "property and civil rights in the province" and could not be constitutionally sustained merely by virtue of the fact that they purported to implement Canadian treaty obligations entered into by the federal government.

¹⁵⁹S.C. 1935-36, c. 14.

¹⁶⁰S.C. 1935-36, c. 44.

¹⁶¹S.C. 1935-36, c. 63.

¹⁶²[1936] S.C.R. 461.

¹⁶³[1937] A.C. 326.

D. THE HISTORY OF THE LORD'S DAY (ONTARIO) ACT (1950-PRESENT)

True to the prediction of Laurier in 1906,¹⁶⁴ neither the province of Ontario, the western provinces, nor the Maritimes immediately took advantage of the "opting out" clause to diminish in the slightest the restrictions in the federal *Lord's Day Act* of 1906. On the other hand, Quebec enacted in 1907 its own *Act respecting the observance of Sunday*¹⁶⁵ which specifically continued in force all the Sunday observance laws which had previously been in existence in the province, then added other sections restricting industrial work, business, theatrical performances, or pleasure excursions, and provided a limited sabbatarian exemption. The section of the Act dealing with prohibitions of industrial work, business, theatrical performances or excursions was declared *ultra vires* in 1911 by the Supreme Court of Canada¹⁶⁶ as creating offences against the criminal law but the other permissive sections in the legislation probably continued in force.¹⁶⁷

In 1922, Ontario dealt indirectly with the question of Sunday work in certain employments by enacting *The One Day's Rest in Seven Act* providing "at least twenty-four consecutive hours of rest in every seven days, and wherever possible . . . on a Sunday" for employees of hotels, restaurants or cafés. However the province did not enter the Sunday observance field directly under the "opting out" clause until 1950¹⁶⁸ when on March 21 of that year, a bill entitled *The Lord's Day (Ontario) Act* was introduced by Hon. Dana H. Porter, then Attorney General for Ontario. The government of the day had received requests from the cities of Toronto and Windsor for permission to have all types of sports on Sunday, both requests having been endorsed by an affirmative vote of the electorate and supported by a resolution of the councils of the respective municipalities.¹⁶⁹ Mr. Porter stated the government's approach on the question as follows:

The matter has been given very great consideration by the government. It is recognized that in a province as vast in area as Ontario and with different conditions among the people, that there are a variety of opinions on the subject of Sabbath laws. This is due to a number of reasons including the proximity of the province to states and provinces with different Sabbath laws, or different enforcement of the same. Urban conditions, radio and other things, have had their effect upon the opinion of our people.

¹⁶⁴ 77 H.C. Deb. (Can.), at cols. 6601-6602.

¹⁶⁵ S.Q. 1907, 7 Edw. 7, c. 42.

¹⁶⁶ *Ouimet v. Bazin* (1911), 46 S.C.R. 502.

¹⁶⁷ The sabbatarian exemption clause was repealed in the consolidation of 1941, for no apparent reason. Otherwise the 1907 Act still continues intact as the *Sunday Observance Act*, R.S.Q. 1964, c. 302, although the section restricting industrial work, business, theatrical performances and excursions where alcoholic beverages are sold remains *ultra vires* in the absence of judicial reversal of *Ouimet v. Bazin*, *ibid.*

¹⁶⁸ S.O. 1922, c. 93.

¹⁶⁹ Legislature of Ontario, Debates, March 21, 1950, at pp. A-5 and A-6. The question submitted to and approved by the Toronto voters related to "amateur, professional and other forms of commercial sport" and by the Windsor voters, "[l]ocally specified forms of sport or entertainment."

The government is most anxious to preserve the essential features of the Sabbath Day, and believes that anything approaching a wide-open Sunday is most undesirable. The religious aspect of the day should be regarded by everybody as being of primary importance. It is also altogether good that the day should be a day of rest as far as possible, from work. It is of course recognized that the Lord's Day Act has a long list of exemptions in the form of works of mercy and necessity, set out in some 24 subsections. In recent years, due to the complex society in which we live, there has, of necessity, been more work on Sunday than previously. The government feels, however, that this should be a minimum, having regard to all of the factors in the situation.¹⁷⁰

The bill was mainly permissive in nature, giving to municipalities the right to have sports¹⁷¹ which they specified by bylaw between the hours of 1.30 and 6 p.m. on Sundays, provided the municipal council had first obtained the assent of a majority of municipal electors voting on the specific question. Once having obtained the assent, the municipal council could authorize and specify the sports to be played and where they were to be played (between the designated hours of 1.30 and 6 p.m.), and any other form of regulation and control. Also, such a bylaw could be initiated upon the presentation of a petition signed by at least ten percent of the municipal electors which would then compel the council to submit the question to the electors. Once a bylaw permitting sports had been passed, it could not be repealed by council without first obtaining assent of the electors to the repeal, and the petition device was available to ten percent of the electors in respect of a repealing bylaw as well. Horse racing was specifically excluded as an allowable sport.

The bill became law on April 6, 1950 and later that year was included in the Revised Statutes of Ontario in exactly the same form.¹⁷²

There were no changes for some ten years until Hon. A. Kelso Roberts, then Attorney General, introduced an amendment on February 9, 1960 to legalize "any Sunday concert, recital and other musical performance of an artistic and cultural nature at which an admission fee is charged"¹⁷³ if produced by a non-profit organization. Again, the time was restricted to between the hours of 1.30 and 6 p.m., but no municipal bylaw or assent of the municipal electors was required for these activities, the provision applying on a province-wide basis. This amendment became law on April 12, 1960, and was unchanged in the Revised Statutes of Ontario that year except for a minor rewording of the provision relating to daylight saving time.¹⁷⁴

¹⁷⁰Legislature of Ontario, Debates, March 21, 1950, at pp. A-6 and A-7.

¹⁷¹In the legislative debates, Mr. Porter and Premier Frost stated that they did not regard the term "sport" as including movies or television (where admission charged) of sporting events so as to legalize these on Sundays. The term used in the prohibitions of section 6 of the federal *Lord's Day Act*, c. 218 is "public game or contest", while section 1 of the Ontario legislation legalizes any "public game or sport" (specified in a valid municipal bylaw) which otherwise would be unlawful under section 6 of the federal Act. The Ontario legislation also legalizes "any work, business or labour in connection with any such public game or sport" which otherwise would be unlawful under section 4 of the federal Act.

¹⁷²*The Lord's Day (Ontario) Amendment Act, 1960*, S.O. 1960, c. 62, s. 1.

¹⁷³R.S.O. 1960, c. 225.

¹⁷⁴*Ibid.*, s. 7.

Then in 1961, a bill providing for a new Act¹⁷⁵ was introduced which repealed the legislation of 1950 and 1960, but which was essentially a rewriting of the earlier legislation in an expanded form, and with some important new additions. First, the legislation extended the time restrictions for the permitted Sunday activities by removing the 6 p.m. closing limitation so that they could be carried on any time after 1.30 p.m., or in the case of matters for which local option was provided any portion of the period between 1.30 and midnight that the municipal council permitted by bylaw. Second, movies and theatrical performances, concerts and lectures (run by profit-making organizations) were permitted on the same local option basis as Sunday sports had been since 1950, a change which would permit a municipal council with the assent of the municipal electors to name all or a part of the municipality in which the performances could take place, and the type of performance—i.e., whether moving pictures, theatrical performances, concerts or lectures or a combination thereof. Third, the legislation continued the provision relating to concerts, recitals or other musical performances for a price if run by non-profit organizations on the same province-wide basis as before. And fourth, there was a minor amendment to *The Theatres Act*¹⁷⁶ to give effect to the new section relating to moving pictures.

One of the reasons given by Hon. Leslie M. Frost, then Premier of Ontario, for introducing this less restrictive legislation was that the 1950 Act allowing sports on a local option basis had proved to be acceptable in Ontario and had not led to an open Sunday throughout the province.¹⁷⁷ He also provided the rationale for the type of local option adopted:

From a religious aspect, it should be noted that there are differing customs in various parts of the province. As a matter of fact, there are differing customs as between municipalities which may be contiguous. In some places there are religious observances in the afternoons; in some places there are religious observances in the evenings.

This bill permits the option on the part of the municipalities to choose any hours or combination of hours after 1.30 o'clock in the afternoon. In one community it may be desirable, for instance, to have sports and theatre operations in the afternoons. In others it may be desirable in the evenings. Others may desire the same for all the hours following 1.30 p.m. In other cases, no doubt, there will be the desire on the part of the people to have no such operations at all.

Premier Frost also provided the background to the changes respecting moving pictures and theatrical performances:

Eleven years ago, when The Lord's Day (Ontario) Act was passed, there was no demand for motion pictures or theatrical performances on Sunday. As a matter of fact, both the industry and labour connected with the motion picture and theatrical business, or profession, at that time opposed the idea, very definitely.

¹⁷⁵S.O. 1960-61, c. 50.

¹⁷⁶S.O. 1960-61, c. 99, s. 7.

¹⁷⁷Legislature of Ontario, Debates, 1960-61, at p. 1616.

Since that time, however, because of technological changes including television, the attitude has entirely changed.

In the meantime, of course, we have added another 1.5 million people to our population. Today, instead of dealing with a population of 4.5 million, we are dealing with a population of 6 million, with the result that our urban communities are that much bigger, and living conditions in these urban communities have changed accordingly and we now have the demand—which is quite widely expressed—for performances of this nature on Sunday.¹⁷⁸

The legislation was passed with the support of all parties in the Legislature, and became law on March 29, 1961.

An amendment¹⁷⁹ in 1965 provided that every municipal bylaw providing for regulation and control of any of the activities in the Act should be subject to Part XXI of *The Municipal Act*¹⁸⁰ which gives municipalities power to impose penalties for violations and otherwise to enforce any of its bylaws.

The most recent amendments to *The Lord's Day (Ontario) Act* introduced in 1968¹⁸¹ made three significant changes. First, they legalized the operation of agricultural, horticultural or trade shows or scientific exhibitions¹⁸² after 1.30 p.m. if the appropriate municipal by-law were passed. Second, they legalized Sunday horse racing after 1.30 p.m. on the same local option conditions. And third, they removed the necessity of a vote of the municipal electors in respect of Sunday sports, movies, theatrical performances, concerts and lectures and other activities in the Act as a condition precedent to a municipal bylaw authorizing same after 1.30 p.m. in whole or in part. This last amendment did not prohibit such a vote, but merely left the decision as to whether to hold one up to the municipal council.

In moving second reading of the first item above, Hon. Arthur A. Wishart, Attorney General for Ontario, explained the principle of the legislation:

I think, Mr. Speaker, that the principle which underlies this type of legislation is that the public, a great body of the public—I would say the great bulk of the public—look upon Sunday, particularly the afternoon and evening hours, as time of recreation and recreation in the full and best sense of that word. The bill, of course, deals only with the hours after 1:30 in the afternoon, so that, as one of the hon. members has pointed out, the morning

¹⁷⁸Legislature of Ontario, Debates, 1960-61, at pp. 1616-1617.

¹⁷⁹S.O. 1965, c. 66.

¹⁸⁰R.S.O. 1960, c. 249, ss. 482-486.

¹⁸¹S.O. 1968, c. 68.

¹⁸²Section 5a(3)(a) reads:

any exhibition or show that is conducted by any society or association to which *The Agricultural Associations Act*, *The Horticultural Societies Act* applies or by any corporation incorporated without share capital by or under any special or general Act or at any trade show or scientific exhibition; . . .

church service is not interfered with. Someone pointed out that the afternoon services, which we used to have in days gone by, and gone by for some time, are not there now to occupy the attention of the public. The public do not attend them, so that they have passed generally out of existence.

Many people, a great many people, have the facilities to enjoy golf, the summer cottage, the water skiing, boating, sports, and nobody objects to that. They take advantage of the Sunday to enjoy those activities. . . .

I think the activities of this bill particularly—agricultural exhibitions, horticulture shows, trade shows, home shows, the boat show—these are a wholesome open exhibition with educational value, with recreational value. There are many people who do not have the summer cottage, who do not have the golf course, who are living stacked up in apartments, who perhaps are living in a little home without even a back yard.

I think it is far better, far better, that they be offered the activity to go out in the fresh air, to go out to the exhibition, to go out on the shore of the lake in the exhibition grounds and into those buildings which are well decorated and lighted and attractive, and let them see these things, . . .

. . . I think it is a good thing to leave it to the local municipality. There are some municipalities who may still not see fit to pass the bylaw. In that bylaw the municipality may specify—and I think this is an important point to bear in mind—in that bylaw passed by the local municipality it may specify and spell out activities which it wishes to permit, or to prohibit.

I would point out further, that the type of activity permitted in this bill—the fair, the show, is not one that is going to recur and recur and recur on every Sunday through the 52 weeks of the year. It will be in most municipalities once a year—the Canadian national exhibition; perhaps two or three Sundays in the year. The boat show will be one Sunday; the home show, if it were included under trade show, would be once in the year in any particular municipality.¹⁸³

He later reiterated the general thrust of these remarks in respect to Sunday horse racing.¹⁸⁴ These amendments became law on July 23, 1968, with the exception of the provision relating to agricultural, horticultural or trade exhibitions or shows which became law on May 30, 1968.

The extensive historical account of Sunday laws in this chapter has been provided as an essential aid to understanding how the pattern of the traditional Sunday in Ontario was built up. The federal *Lord's Day Act*

¹⁸³Legislature of Ontario, Debates, 1968, at pp. 1871-1872.

¹⁸⁴Legislature of Ontario, Debates, 1968, at p. 4834.

is still largely based on a legislative approach adopted in England in the 17th and 18th centuries and continued in Ontario in the 19th century, namely, that church attendance and religious conformity should be encouraged by prohibiting secular activities and restricting employment that might attract people away from their religious exercises; also that commercial recreations, entertainments and amusements profaned the Lord's day and should be prohibited. Another approach appeared in the federal Act in 1906 which related to the provision of one day's rest in seven for labour, but -this was clearly secondary to the religious approach.

The Ontario legislation enacted since 1950 has been consistent with the historic legislative approach and has attempted to designate certain forms of commercial recreation, entertainment and amusement which might not profane the Lord's day as determined by each municipality.

One of the basic questions of this study and review is whether the historic legislative approach is still appropriate for Ontario now and in the future. This will be discussed in Chapter 9.

The next chapter provides the religious background to the traditional Sunday in Ontario, and is complementary to this historical account of Sunday laws.

CHAPTER 4

THE RELIGIOUS BACKGROUND OF SATURDAY AND SUNDAY AS SPECIAL DAYS

S U M M A R Y

- A. EARLY ORIGINS OF THE SABBATH
- B. THE TRANSITION FROM SABBATH TO SUNDAY
- C. RELIGIOUS OBSERVANCE OF SUNDAY FOLLOWING
THE REFORMATION
- D. PRE-TWENTIETH CENTURY RELIGIOUS OBSERVANCE
OF SUNDAY IN NORTH AMERICA
- E. PRESENT DOCTRINES OF SOME CHURCHES IN CANADA
RESPECTING SUNDAY

Historically, the religious aspect of Sunday observance legislation in Ontario has been one of the most prominent features. This has arisen, of course, from the Judaeo-Christian heritage of the western world. We consider it appropriate in this report to review the background of Saturday observance and Sunday observance in the Jewish and Christian religions in order that the full significance of these days be capable of assessment in a contemporary context.

Before embarking on this task, it should be clearly understood that we do not purport to take any theological position on these matters. The controversy over whether Saturday or Sunday is the true Sabbath has existed for many hundreds of years and it is not our intention to attempt to resolve the matter. Rather, it is necessary to set forth objectively certain facts and religious dogmas as an aid to understanding how Sunday, and to a lesser extent Saturday, came to be regarded as special days in the religious customs and habits of the people of Ontario.

A. EARLY ORIGINS OF THE SABBATH

The earliest biblical reference to the Sabbath is found in the Old Testament Book of Genesis, Chapter 2, verses 2 and 3:

On the sixth day God completed all the work he had been doing, and on the seventh day he ceased from all his work. God blessed the seventh day and made it holy, because on that day he ceased from all the work he had set himself to do.

It is not clear exactly when the Jewish people began to observe the Sabbath day as a matter of religious practice. There was no indication from the period in which the Jews served the Egyptians that Sabbath observance was practised. It was not until after the exodus from Egypt, when the Old Testament records that the

Israelites received a double quantity of manna on the sixth day and asked Moses why this was,¹ that any evidence appeared.

Still later, of course, was the giving of the Ten Commandments to Moses at Mount Sinai, the fourth of which commands:

Remember to keep the sabbath day holy. You have six days to labour and do all your work. But the seventh day is a sabbath of the LORD your God; that day you shall not do any work, you, your son or your daughter, your slave or your slave-girl, your cattle or the alien within your gates; for in six days the LORD made heaven and earth, the sea, and all that is in them, and on the seventh day he rested. Therefore the LORD blessed the sabbath day and declared it holy.²

Another strand which must be acknowledged in the development of the Jewish Sabbath was the New Moon festival as practised by various nomadic peoples among whom the Israelites travelled. An American, Dr. Walter Russell Bowie, has written:

The origin of the observance is still in dispute but it seems reasonable to suppose, in view of the juxtaposition of the new moon and Sabbath in, for example 2 Kings 4:23 and Isaiah 1:13, that it stemmed from the feast of the full moon. If this is the case then it may be inferred that in the course of time two subordinate feasts came to be kept between these two major observances, so that there was a moon festival roughly every seven days. We may assume further that when Israel settled down to agriculture and abandoned worship of the moon-god, which had formed a part of their religion when as nomads they had moved about the desert at night, convenience suggested that the occurrence of these holy days be regularized by divorcing them from the changes of the moon, and the sabbath every seven days was the result—the feast of the new moon being retained independently of it.³

A third strand to be noted was the possible influence of the planetary week on the early Jewish people, by which system the seven days were allotted to the Sun, the Moon and five other planets.⁴ However, little is known of this.

Whatever the origins (i.e., the Creation, or the Decalogue, or the New Moon festival, or the planetary week), the weekly cycle and the seventh day Sabbath was firmly established by the time of the

¹William Hodgkins, *Sunday: Christian and Social Significance* (1960), p. 1. The Old Testament reference to this event is Exodus 15: 22-30. For general references to this and other events in this chapter from a Christian point of view, see *Sunday Rest in the Twentieth Century* (1905, ed. Jackson), pp. 165-238, which consists of papers delivered at the International Sunday Rest Congress at St. Louis in 1904.

²Exodus 20: 8-11. All biblical quotations in this chapter are taken from *The New English Bible* (Oxford University Press and Cambridge University Press, 1970).

³Interpreter's Bible, Vol. I, pp. 488-489.

⁴See W. K. Lowther-Clarke, *Liturgy and Worship* (1932), p. 202.

exodus, with the day of rest being observed from Friday sundown to Saturday sundown.

As to the mode of observance, it is clear that the day was to be used as a time of prayer and sacrifice.⁵ Trading on the Sabbath was regarded as a profanation of the day,⁶ and it was generally set apart for rest and refreshment for Jewish adherents, strangers and even animals.⁷ This situation prevailed some 1500 years before the birth of Jesus Christ.

In fact, by the time of Jesus, the observance of the Sabbath had become a hallmark of Judaism and resulted in an increasing rigidity of rules and regulations concerning the day. This appears quite clearly in the pages of the New Testament in which Jesus is shown as encountering several clashes with the Pharisees and the Jewish religious authorities because of various technical transgressions of the Sabbath laws.⁸ Nevertheless, it would appear from the New Testament records that Jesus continued to observe the Jewish practices of Sabbath rest and worship and his disciples also continued these practices in the days immediately following his death. The disciples too were involved in technical transgressions of the Sabbath laws, such as the incident recorded in Luke's gospel⁹ when the disciples were picking and eating corn as they walked through the field on the Sabbath and were questioned by the Pharisees, which prompted the comment of Jesus that the disciples were hungry and that "the Sabbath was made for man and not man for the Sabbath".¹⁰

Even after the death of Jesus, the disciples and other Christians continued to observe the Jewish Sabbath. The opening chapters of the Book of Acts describe the disciples as worshipping regularly, in fact daily, in the temple at Jerusalem and conducting their teaching, in large measure, in that setting. Of course, by this time the Jews as a people were widely spread throughout the Roman Empire, and wherever there were Jewish communities there were Jewish synagogues established. As Christianity began to spread beyond the limits of Jerusalem and its environs, the first contacts were often made in these synagogues in various Roman cities. In these early days, then, the first Christian converts both in Jerusalem and far beyond were Jewish, and they continued to observe their own Jewish festivals, including the Sabbath, simply adding to them other days of special Christian significance. Theologically, this was possible because Christianity regarded itself as the fulfilment of Jewish prophecy. Legally and politically it was highly important for the Christians to be considered as a continuing part of the Jewish religion because the Jewish religion was one of the few religions that had legal status within the Roman Empire. The loss of such status was to make a Christian subject to Roman persecution.

⁵ Isaiah 56: 6, 7.

⁶ Nehemiah 13: 15-17.

⁷ See generally Hodgkins, *op. cit.*, pp. 3-4.

⁸ See Mark 2: 23-28; Luke 6: 6-11; John 5: 1-16.

⁹ Luke 6: 1-5.

¹⁰ See Mark 2: 27.

B. THE TRANSITION FROM SABBATH TO SUNDAY

While Christianity was still within the bosom of the Jewish faith, the commonest festival to be added to the religious practices of Christians was the first day of the week, sometimes referred to as the "eighth day". This soon came to be known as the Lord's day, signifying certain events recorded as having occurred on that day. First and foremost, of course, was the resurrection of Jesus Christ reported to have taken place on the first day of the week. Also, Jesus' post-resurrection appearance is recorded as occurring on the first day of the week.¹¹ Still later, the gift of the Holy Spirit recounted in Acts on the Feast of Pentecost is described as taking place on the first day of the week.

The first time the term "Lord's day" appears is in the Revelation to John,¹² and although it is not absolutely certain that this reference is to Sunday as the first day of the week, later uses of the phrase in writings contemporary with the books of the New Testament confirm that this is what was meant.¹³ Finally, it is indicated in Corinthians¹⁴ that certain Christians were already meeting regularly on the first day of the week.

The break between the Jewish observance of the Sabbath and the Christian observance of the Lord's day was a gradual one. It must be remembered that the strength and centre of authority for the early Christians, who were also Jewish, was the City of Jerusalem. It was very necessary that a satisfactory working agreement be achieved between the Jewish Christians and the Jews, and throughout most of this early period the tendency was to observe the Sabbath as well as the Lord's day as days of worship. A major theme in the Book of Acts is the way in which such an effective relationship was worked out. In fact one commentator has concluded that without the Jewish heritage of observing one day in seven as holy, the weekly commemoration of the resurrection would hardly have arisen.¹⁵ However, Jerusalem was destroyed about 70 A.D., and there followed a dispersal of Jewish Christianity.¹⁶ The practice of observing both the Sabbath and the Lord's day began to fade in favour of the distinctly Christian practice of worship on the Lord's day only. This shift in practice gradually worked itself out during the next two centuries so that by the Edict of Toleration in 313 A.D., Christianity embodying the notion of Lord's day observance was on the road towards attaining some form of legal recognition within the Roman Empire. Perhaps the best evidence of the Christian observance of Sunday, following the destruction of Jerusalem, is found in Justin Martyr's First Apology, probably written about 150 A.D.:

... [W]e all have our common meeting on the Sunday because it is the First Day, on which God, having changed darkness and

¹¹ John 20: 26.

¹² Revelation 1: 10.

¹³ Hodgkins, *op. cit.*, pp. 15-16.

¹⁴ I Corinthians 16: 2.

¹⁵ Lowther-Clarke, *op. cit.*, p. 202.

¹⁶ J. W. C. Ward, *A History of the Early Church to A.D. 500* (1937), p. 15.

matter made the world, and Jesus Christ our Saviour on the same day rose from the dead. For they crucified him on the day before Saturday and on the day after Saturday, which is Sunday, having appeared to His apostles and disciples, He taught [them] those things which we have submitted to you also for your consideration.¹⁷

Before leaving this phase of the development from Jewish Sabbath observance to Christian Sunday observance, some further observations need to be recorded. Early Christians observed Sunday as a holy day on the one hand because it was a day to commemorate the resurrection of Jesus Christ. It is clear that this observance of the Lord's day was not based on the Jewish Sabbath. In fact it was believed by many that the power of the resurrection freed Christians from the necessity of obedience to the confining Jewish laws which were often strictly construed and applied respecting Sabbath observance. However, on the other hand, it is equally clear that the Christian Sunday assumed a number of the features of the Jewish Sabbath. There are many interesting parallels to be drawn, for instance, between the styles of worship and the liturgies observed in Christianity and Judaism to this very day. The following was noted by Paul Cotton, an American writer on the subject:

From the early Christian centuries there has come down to us a mass of evidence pointing to the influence of the Jewish Sabbath on the Christian Sunday. As we have noticed, the Sabbath was regarded as a day of joy, a festival among the Jews. No mourning was to take place on that day. The Christians too regarded their Sunday in like manner, as we learn from the Epistle of Barnabas — "We keep the eighth day for festivity". In recognition of this joyous character of the Sabbath, no fasts were allowed in Judaism, these being a desecration of their sacred day. . . . In their prohibition of fasting on the Lord's Day, Christianity followed, not paganism, but Judaism.¹⁸

The division of time into weekly cycles with one of the days in the week set aside for religious observance and rest was not peculiar to Jews and Christians alone, but extended to most parts of the world at a fairly early period. In his "Introduction to the Critical Study . . . of the Scriptures", T. H. Horne wrote:

One of the most striking collateral confirmations of the Mosaic history of the creation, is the general adoption of the division of time into *weeks*, which . . . has equally prevailed among the Hebrews, the Egyptians, Chinese, Greeks, Romans and northern barbarians; — nations, some of whom had little or no intercourse with others, and were not even known by name to the Hebrews.¹⁹

¹⁷ As reproduced in Hodgkins, *op. cit.*, pp. 18-19.

¹⁸ Paul Cotton, *From Sabbath to Sunday* (1933), pp. 92-93.

¹⁹ T. H. Horne, *Introduction to the Critical Study . . . of the Scriptures*, vol. 1 (1839), p. 143, as reproduced in S. A. Kaplan, *Can Persecution Arise in America* (1967), p. 59.

The Edict of Toleration (more properly called the Edict of Milan) in 313 A.D. was not a law providing legal sanction for Christianity and Lord's day observance in the Roman Empire. It was, as its name suggests, merely a declaration of the Emperor's toleration of the Lord's day on the same basis as the other religious festivals at the time. And Constantine's first edicts in 321 A.D. relating to Sunday observance (referred to in Appendix I) were equally consistent with pagan sun worship as they were with Lord's day observance.

But gradually Christianity began to assume dominance. In 325 A.D., Constantine called together all the Christian church leaders for the Council of Nicaea, one of the reasons being to resolve the internal issue of the proper memorial to mark the crucifixion and resurrection of Jesus Christ — the observance of Sunday as the day of resurrection (as favoured by the Churches of the West) or the fourteenth day of the Jewish month Nisan irrespective of the day of the week (as favoured by the Churches of the East). This controversy had shaken the internal foundations of the early Christian Church²⁰ in the second and third Centuries, and on more than one occasion the bishop of the Christian Church in Rome had sought to cut off from the common unity the parishes of all Asia for their failure to agree on observing the resurrection on Sunday. The matter came to a head when in 314 A.D. the Council of Arles ruled that all Christians must keep the same day for Easter. The Council of Nicaea settled the matter eleven years later when Sunday was fixed as that day. Thus Sunday resurrection observance came into its own as an integral component of Christian Church doctrine, while the celebration of the crucifixion on the fourteenth day of Nisan went into eclipse.²¹

Christianity eventually became the official religion of the Roman Empire in 380 A.D., and in 386 A.D. the term "Lord's day" appeared in the civil legislation of Rome for the first time.²²

By the beginnings of the fifth century most of Europe was under the sway of western Christendom with its ecclesiastical head located in Rome. Lord's day observance legislation became the order of the day as a natural result, while Sabbath observance became merely a matter of voluntary practice among the Jews who had become scattered throughout various parts of the world. The early controversy between Sabbath and Sunday continued, of course, as it has to the present day, but it was the Christians who prevailed in most countries in securing the support of the state for the protection of their special day.

It is not entirely clear at what point certain elements in the Christian Church began to claim that the term "Sabbath" in the fourth commandment of the Decalogue could be equated with the Lord's day. However, in England there were commands from the Christian religious authorities to the priests to teach the commandment that way as

²⁰ Warren L. Johns, *Dateline Sunday*, U.S.A. (1967), pp. 242-244.

²¹ *Ibid.*, p. 245.

²² A. H. Lewis, *A Critical History of Sunday Legislation* (1888), p. 33.

early as 1281 A.D.,²³ and many segments of the Christian Church in Canada in the twentieth century have taken this position as well.²⁴

C. RELIGIOUS OBSERVANCE OF SUNDAY FOLLOWING THE REFORMATION

While Sunday observance in pre-Reformation Europe fell into fairly low esteem, the Reformation saw the assertion of a more strict and authoritarian notion concerning the religious basis of Sunday observance. For a while, such theological decision and appeal for authority was complicated in England by the fact that having set aside papal jurisdiction over the Church, the kings of England assumed to themselves the spiritual power and overlordship of the Church. The answer which the reformers in England and on the Continent devised for this and other problems was to replace the authority of the papacy, or indeed of the king, by the authority of the Bible. This trend began in England over a century before the Reformation proper through the work of John Wycliffe in not only declaring the supremacy of the Bible in matters of faith and doctrine, but also by translating the whole of the Bible into the English language to make it available to the whole country.

The first of John Wycliffe's writings to be printed was the *Triologue* in 1525. In that publication he asserted that Sunday should be kept in three principal ways — thinking (e.g., how God is almighty, all-knowing, etc., and in meditation as to the significance of the resurrection), speaking (e.g., confession of sin made immediately to God), and worshipping (e.g., attending public worship, and by avoiding over-indulgence at the table, making sure that the mind was in the best state for attending to the day's duties).²⁵ On top of these obligations, Wycliffe imposed the following Sunday duty:

After worship visit such as are sick or in mischief, especially those whom God hath made needy by age, or by other sicknesses — the feeble, the crooked, the lame: these thou shalt relieve with thy goods after thy power and after their need, for thus biddeth the Gospel. . . . And so men should not be idle, but busy on the Sabbath-day about the soul, as men are on the week-day about the body.²⁶

²³Lewis, *op. cit.*, pp. 81-82.

²⁴See, for example, the official statement of all the Roman Catholic Archbishops of Canada to the Select Committee in 1906, as follows:

The Catholic Church has always held and thought that the Jewish Sabbath, with its rigorous ceremonial observances, and restrictions, has been superseded by the Christian Sunday. Consequently, not from the Mosaic Law, but from the Gospel dispensation does it derive its warranty, and the nature of its commands. Prescribed by the law of love, not by that of fear, its chief characteristic is that it has been made for man, not man for it. Both in a physical and a spiritual sense it has been made for him.

from Proceedings of the Select Committee of the House of Commons on Bill No. 12, respecting the Lord's Day, April 27, 1906, at p. 151.

²⁵Hodgkins, *op. cit.*, p. 34.

²⁶*Ibid.*, as quoted from Vaughn, *Tracts and Treatises of Wycliffe*, pp. 5-6.

All of the great leaders of the Reformation, both on the Continent and in England, not only translated the Scriptures into their own language but also wrote sizable commentaries on them. Both Luther and Calvin, in their commentaries on the Genesis account of the Creation,²⁷ inferred from that account that God had appointed Sunday as part of the very active Creation. They also found in the fourth commandment a moral injunction which guided the observance of Sunday. Luther commented:

... No day is better or more excellent than another. [Religious] duties ought to be performed every day. But the majority of mankind are so cumbered with business, that they could not be present at such assemblies. Some one day, therefore, at least, must be selected in each week for attention to these matters. And seeing that those who preceded us chose the Lord's Day for them, this harmless and admitted custom must not be readily changed; our objects in retaining it are, the securing of unanimity and consent of arrangement, and the avoidance of the general confusion which would result from individual and unnecessary innovation.²⁸

In the same spirit, the various confessions of other reformers in the 16th century practically all referred to Sunday not only as a day ordained by God as a day of rest, but set apart by God for worship. The attitude of the reformers is perhaps best summarized in two statements, the first from the Augsburg Confession in 1530 wherein it was stated that the Church appointed the Lord's day:

That in it men might have an example of Christian liberty, and might know that the observance neither of the Sabbath nor of any other day was of necessity.

and the second from the Helvetic Confession in 1536:

For we believe neither that one day is holier than another, nor that rest by itself is acceptable to God, but yet we keep the Lord's Day, not the Sabbath, by a voluntary observance.²⁹

A development parallel to the work of Luther and Calvin and the other reformers was the reform within the Roman Catholic Church sparked by Ignatius Loyola, organizer of the famous Jesuit Order. He espoused a Roman Catholicism, based on pragmatism, which was intended to be more responsive to the immediate needs of society. This included the religious observance of the Lord's day both as a day of rest and as a day set apart for worship and the other religious duties and obligations owed to God, but within the hierarchical authority of the Roman Catholic Church. The relevance of this development to Canada was articulated in 1956 by one of Canada's leading church historians, Dr. H. H. Walsh:

Though there are important differences in Calvinistic and Ignatian ascetisms yet their ultimate effects in the new world were

²⁷Genesis 2: 3.

²⁸Hodgkins, *op. cit.*, pp. 36-37, as quoted from Hessey, Sunday, pp. 167-168.

²⁹Hodgkins, *op. cit.*, p. 40.

strikingly similar and the Province of Quebec today has as large a legacy of blue laws as any New England state.³⁰

D. PRE-TWENTIETH CENTURY RELIGIOUS OBSERVANCE OF SUNDAY IN NORTH AMERICA

The type of Ignatianism which reached New France was a product of the French counter-Reformation, heavy in piety and evangelism, and which gave rise to the magnificent missionary work of the Jesuits in Huronia and elsewhere in New France. This was accomplished under a religio-political system which was largely a social democracy, with the Church having extensive influence on the highly concentrated political authority of the day.³¹ This was in contrast to the religious background of English-speaking Canada whose population came by immigration directly from England and Europe and indirectly by way of the United States. There the Calvinistic strain was predominant, and there was also the strong influence of the empirical do-it-yourself attitude of American frontier life. While there were important differences, then, between the religious backgrounds of French and English Canadians, their approaches towards Sunday observance were remarkably similar, and the effects of this similarity were of no small significance when the Parliament of Canada enacted a common *Lord's Day Act* for the whole of Canada in 1906.

The other major religious development in the New World in the 17th and 18th centuries was the strong impress of puritanism upon the religious life of the whole of North America as the result of the New England colonial experiments. Puritans of all denominations were constantly heard denouncing the immoralities and extravagances of the particular time, and were strong advocates of the congregation as the centre of religious and ecclesiastical authority. This notion of a congregation was tied in with regular and periodic religious observance on a corporate basis, and of course Sunday was the day of primary religious observance. This emphasis on the congregation had its effect on French Roman Catholic Canada by the institution of the practice unique in the Catholic world of naming church wardens in each parish. In the realm of Anglicanism, the most marked effect of the congregational principle was the adoption of electoral practices from the election of bishops and the development of a synodical form of church government.

European concepts of a national religion, usually corresponding with that of the national monarch, and all the paraphernalia of an established church reached out across the Atlantic to have a variety of effects upon the New World. On both sides of the ill-defined border between New England and New France prior to 1673 it was taken for granted that triumph in battle for one side involved the suppression of the religion of the defeated party.³² Yet as early as 1713 in the Treaty of Utrecht there arose a policy of toleration and co-existence

³⁰Walsh, *The Christian Church in Canada* (1956), p. 10.

³¹See Lower, *Canadians in the Making* (1958), pp. 42, 60.

³²Walsh, *op. cit.*, p. 87.

between Roman Catholics and Protestants in what was later to become Canada, when the triumphant British agreed that any Acadians who remained and became subjects of Great Britain were "to enjoy the free exercise of their religion according to the usage of the Church of Rome as far as the laws of Great Britain do allow the same." And following the defeat of the French at the hands of the British on the Plains of Abraham in 1763, the *Quebec Act* of 1774 protected the Roman Catholic religion of the defeated French throughout the New World. Indeed, ever since this period a policy of religious pluralism has increasingly been recognized as the only possible basis upon which Canadian nationalism could be built. While the first religious pluralism in Canada involved primarily the Protestants and the Roman Catholics, by the beginning of the twentieth century it began to spread to other groups such as members of the Jewish faith as well. In short, religious pluralism has become part of the fabric of Canadian life and, in varying degrees, has been an underlying factor in the development of social policy in this country.

The United Empire Loyalists brought with them to that area of the province of Canada now known as Ontario the fundamental teachings of the established Church of England, but there were also Roman Catholics, Methodists, Presbyterians, Quakers and others. While there were some variations in their practices and attitudes towards the Lord's day, theirs was usually one of strict observance.

At the beginning of the 19th century, great religious revivals were under way in Upper Canada. Most of these revivals were conducted by itinerant visiting evangelists who on a temporary basis filled a large religious gap in the lives of the settlers occasioned by the scarcity of regular clergy of any denomination. This lack of a resident ministry on a widespread scale throughout the rapidly-settled colony meant that many people had little, if any, religious instruction other than that which the ordinary family was able to pass on to its own children. Sunday observance, as a regular part of the family life, likewise depended upon individual initiative and was probably more honoured in the breach than in the observance. These religious revivals consequently tended to fill a gap in social and moral instruction and control as well as their more particularly religious function. While the churches which sponsored these religious revivals purported to avoid direct political action, issues such as prohibition, the observance of the Lord's day and the suppression of prostitution were widely regarded as such clear moral matters that the Church could not be silent about them.³³

During the later years of the 19th century when Canada was achieving Confederation and self-government, the churches of Canada finally began achieving a territorial identity. Regular clergy appeared in greater numbers and were assigned to territorial parishes, and itinerant evangelists began to appear less frequently. Church Courts were organized and more established forms of church government came into being.

³³See Grant, *The Cross in Canada* (1958), p. ix.

The basis for most of these church organizations was clearly linked to the agricultural nature of the Canadian economy. Consequently, the attitude and practice of Sunday observance was that calculated to fit in with an agricultural economy and this was reflected in the agricultural exceptions in the first Lord's day legislation in Upper Canada enacted in 1845 (reenacted by the Ontario Legislature in 1877). The 11 o'clock morning hour for worship was standard practice, but the indulgence of Sunday farm chores as weather conditions and seasons dictated became less and less accepted as socially permitted activity, even though the law might have allowed it. Arthur M. Lower, Canadian historian, described these times as follows:

The country-side had become not only clean but, with exceptions god fearing and law-abiding. When one man, in too much of a hurry, attempted to take in his grain on a fine Sunday, "the neighbours soon stopped that", an old lady who had been one of them exclaimed. Church-going became the rule and in most districts those not associated with a church would have been regarded as "queer".³⁴

However, the shattering effect of wilderness life on religious respect for institutions such as the Lord's day cannot be over-emphasized. The lack of clergy, church buildings and organizations, as well as the pressing needs of agricultural development and the immediacy of the pleasures of hunting and fishing and other outdoor recreations meant that Sunday observance did not even enter into the awareness of many pioneer families for at least a generation. When the clergy and the Church become sufficiently organized in Upper Canada, they probably reacted to the state of laxity that had existed among many pioneer families, and they probably did this with more extreme rigidity and legalism respecting Lord's day observance than might have been the case had the extremes of laxity not occurred. In any event, it was no coincidence that Sunday observance began to be enforced as soon as a stable pattern of church organization was established. And with the advent of steam power and railways, a whole new range of anxieties and problems emerged for the Church. Sunday employment on steamboats, steam engines, railways and canals all intensified the problem and the dreaded Sunday excursions were said to have contributed substantially to the intemperance and moral laxity of the times, so much so that it was thought necessary to make them unlawful in Ontario in 1885.

Towards the end of the 19th century, the labour movement began to grow in response to the de-personalization and employment hardships of the industrial revolution, both in North America and throughout the world. As has been noted in the previous chapter, international congresses on Sunday rest were held in Switzerland as early as 1876, and subsequent congresses in France, Germany and the United States further intensified this movement on both an international and a national scale. Cited as the villain at many of these congresses was the "Continental Sunday"³⁵ introduced in Europe during the French Revolu-

³⁴Lower, *op. cit.*, p. 330.

³⁵This was a system introduced in France early in the 19th century which provided each working man with two days off, after working six. Thus days off would rotate from week to week, and Sunday was treated like any other day.

tion as a form of rejection of Christianity, and which by this point had influenced several generations of Europeans, many of whom were emigrating to North America. It is not surprising that many Church leaders were involved in the development of the labour movement and that this alliance between labour and church resulted in the establishment of the Lord's Day Alliance in Canada in 1888, a development which has already been noted in the previous chapter.

E. PRESENT DOCTRINES OF SOME CHURCHES IN CANADA RESPECTING SUNDAY

The *Lord's Day Act* of 1906 epitomized the growing concern for Sunday religious observance and rest in Canada, a fact which was apparent in the very terms of the Act. Yet it is highly unlikely in Ontario society in 1970 that the religious purpose of Sunday is as predominant as its secular object of ensuring one day's rest in seven. However, many of the Christian churches in Ontario and throughout the world continue to maintain their own internal doctrines concerning the religious aspects of Sunday observance. In many respects, these are really the reiteration of established Christian doctrines dating back many centuries. In other respects, though, they are products of a modern liturgical revival which is under way throughout this continent which seeks to develop new and relevant forms of church ministry for our highly industrialized society.

The following are examples of present-day formalized religious doctrines respecting Sunday followed by various Christian churches in Canada, which have been submitted to us in briefs or other documents:

*Second Vatican Council in Rome, Italy, 1963-1965: excerpts from
the Constitution on the Sacred Liturgy*

But because it is impossible for the bishop always and everywhere to preside over the whole flock in his Church, he cannot do other than establish lesser groupings of the faithful. Among these, parishes set up locally under a pastor who takes the place of the bishop are the most important: for in a certain way they represent the visible Church as it is established throughout the world.

Therefore, the liturgical life of the parish and its relationship to the bishop must be fostered in the thinking and practice of both laity and clergy; efforts also must be made to encourage a sense of community within the parish, above all in the common celebration of the Sunday Mass.³⁶ . . .

Pastors of souls should see to it that the chief hours, especially Vespers, are celebrated in common in church on Sundays and the more solemn feasts.³⁷ . . .

³⁶ Vatican II (1963-65): Constitution on the Sacred Liturgy; No. 42, pp. 152-153.

³⁷ *Ibid.*, p. 167.

By an apostolic tradition which took its origin from the very day of Christ's resurrection, the Church celebrates the paschal mystery every eighth day; with good reason, this, then, bears the name of the Lord's day or the day of the Lord. For on this day Christ's faithful should come together into one place so that, by hearing the word of God and taking part in the Eucharist, they may call to mind the passion, the resurrection, and the glorification of the Lord Jesus, and may thank God who "has begotten us again, through the resurrection of Jesus Christ from the dead, unto a living hope" (I Pet. 1:3). Hence the Lord's day is the original feast day, and it should be proposed to the piety of the faithful and taught to them in such a way that it may become in fact a day of joy and of freedom from work. Other celebrations, unless they be truly of overriding importance, must not have precedence over this day, which is the foundation and nucleus of the whole liturgical year.³⁸ . . .

The social order and its development must unceasingly work to the benefit of the human person if the disposition of affairs is to be subordinate to the personal realm and not contrariwise, as the Lord indicated when He said that the Sabbath was made for man, and not man for the Sabbath.³⁹ . . .

The Presbyterian Church in Canada: Statements approved by the 1968 General Assembly

Statement on the Lord's Day

The first day of the week is called the Lord's Day, because it is the day of the week on which Christ rose from the dead. It is the day which marks the beginning of the new age in which Christ has given new life to the world. Acknowledging that every day is to be lived for the glory of God, the Church gathers on this special day to begin the new week with the worship of God, and to give thanks to God for the hope and joy that Christ has brought to the world.

The Lord's Day and the Old Testament Sabbath are closely related; both acknowledged the creative and redemptive work of God. The law commanded that no work was to be done on the seventh day of the week, so that men could rejoice in God's good creation and rest in the knowledge that their work being ended they were free to make a fresh start. This day also acknowledged God's deed of grace in the deliverance from bondage in Egypt. In the course of time, however, the keeping of this Sabbath law became too much a matter of obeying rules; and this defeated the purpose for which it was given. Believers in the Christ who said that the Sabbath was made for man, and not man for the Sabbath, are not bound by Sabbath rules; they enjoy the blessing of rest which was God's true purpose in giving the commandment, knowing that the only true rest for men is to begin a new way of living in Christ.

³⁸ *Ibid.*, p. 169.

³⁹ *Ibid.*, p. 225.

Believers in Christ begin each new week by putting themselves and their time in hands of God, because they know that their time really belongs to God, and that they themselves are stewards who have God's authority to manage it. They seek to prevent it from being spent on a weary routine of endless work and play, or wasted in a dull and irksome idleness, or taken out of their hands by the demands of religious rules. Under God, they have freedom in the use of their time; and their freedom is renewed on the first day of every week, as they assert that this day is The Lord's Day.

There are great benefits available in an intelligent and reverent use of the Lord's Day — personal and family enrichment through corporate and private worship, shared experiences with families separated through the week, time to leave the ordinary problems and pressures of the week to dwell upon the extraordinary love and joy and strength which are ours in Christ. To Christian people the Lord's Day can be a time for gaining familiarity with the Scriptures, for visiting the sick and elderly, and for doing the works of mercy and love that do not get done through the week.

The Lord's Day is our weekly celebration of the resurrection of Christ. Such a Lord's Day makes the other six days more likely to be truly the Lord's as well. It points us to Him as the living Lord of life, master of all space and time, who at His coming in power and glory will bring in the eternal Sabbath rest which still remains for the people of God, when we shall rest from our labours and rejoice in the fulness of the glory of the triune God.⁴⁰

Recreation and Rest on the Lord's Day

Every activity of the Lord's Day, including recreation, is comprehended within the discipline of Christian stewardship, in which, giving the first of our time to the praise of God, and submitting the whole of our time to the direction of God, we become free under God to enjoy the time at our disposal. We recognize that incessant recreation on the Lord's Day, as well as the complete prohibition of recreation on the Lord's Day, would be incompatible with the Christian stewardship of time, and would be destructive of the rest provided for in the Fourth Commandment. The fact that it is performed on the Lord's Day does not make recreation or any other activity unlawful for Christians, but it may render it unhelpful. In his love to the brethren the Christian will always seek to observe the Lord's Day in such a way as will cause no hurt or inconvenience to his fellows or hindrance to

⁴⁰This statement was submitted by the Presbyterian Church's Committee on Articles of Faith to the 1968 General Assembly and was approved as an interim answer to a request from the Board of Evangelism and Social Action for a study on the doctrine of the Lord's day. This statement is not binding on the Church or its membership, but has been commended by the General Assembly as a document worthy of study and assent.

their observance of the Day in ways that seem appropriate to them.⁴¹

Employment on the Lord's Day (approved by the 1967 General Assembly)

We would affirm as a general rule the right of all persons to a day of rest for the worship of God and for spiritual and physical renewal, and in recognition of this right would urge employers to do all within their power to keep the Lord's day free from unnecessary work.

However, we recognize that certain industries must carry on continuous operation by their very nature, and that there are essential public services which must be maintained on a continuous basis. In such cases, persons employed by these industries and services should be prepared to accept their share of Sunday work. When a firm initiates a policy of continuous operation every consideration should be given to the convictions of employees regarding the observance of the Lord's Day so they may if possible be freed from responsibility for Sunday shift work.⁴²

*The Canadian Reformed Churches: Acts General Synod,
Orangeville 1968*

Art. 68: The Ministers everywhere shall on Sunday, ordinarily in the afternoon service, briefly explain the sum of the Christian Doctrine, comprehended in the Catechism, which at the present time is accepted in the Canadian Reformed Churches, so that as much as possible the explanation shall be annually completed, according to the division of the Catechism itself.⁴³

Heidelberg Catechism: Lord's Day XXXVIII

103.Q. What does God require in the fourth commandment?

A. First, that the ministry of the gospel and the schools be maintained; and that I especially on the Sabbath, that is, the day of rest, diligently attend the church of God, to learn God's Word, to use the sacraments, to call publicly upon the Lord, and to give Christian alms. Second, that all the days of my life I rest from my evil works, let the Lord work in me by his Holy Spirit, and thus begin in this life the eternal Sabbath.⁴⁴

⁴¹This statement is a reply by the Committee on Articles of Faith to a query concerning recreation on the Lord's day. The reply was submitted by the Committee on Articles of Faith to the 1968 General Assembly, and the recommendation to approve this paragraph as an adequate answer was adopted.

⁴²This statement was adopted by the 1967 General Assembly as a general principle for the guidance of the Church in its relation to industry.

⁴³These articles are part of the Church Order which governs the local Canadian Reformed Churches.

⁴⁴The Heidelberg Catechism is part of the doctrine of the Canadian Reformed Churches to which all communicant members have to subscribe by their Profession of Faith.

Doctrinal statements concerning the religious nature of Sunday have come from sources other than churches as well. For example, the Christian Labour Association of Canada submitted the following statements to us in its brief:

When we struggle for the preservation of the "Lord's Day" as a day of rest, we may and must do this out of thankfulness for the fact that Christ redeemed us from the power of sin. Therefore, we must show this thankfulness in obedience to His law for our lives. It is of great importance for man to have a common day of rest, so that he may worship the Lord in a special way in communion with fellow-believers, may listen to the proclamation of the Word, and may enjoy rest and relaxation together with family and friend . . .

Let Christians everywhere, in reverent obedience to God's law, remember the day of rest, observe this day, as much as lies within their power, communally (Sunday), and, wherever this is impossible due to work duties, reserve another day of the week for a meaningful celebration of their liberation from sin's house of bondage.⁴⁵

Contrasted with the above assertions as to the religious nature of Sundays are the contemporary positions taken by persons professing the Jewish and Seventh-day Adventist faith in Ontario. The Canadian Jewish Congress (Central Region), as the representative organization of the Jewish community in Ontario consisting of approximately 125,000 persons, submitted to us that while they wished to take no issue with the majority of Ontarians observing the Christian Sabbath, they wished legal recognition and respect for their religion which requires the Sabbath to be observed from sundown Friday to sundown Saturday. In their opinion, the federal *Lord's Day Act* did not provide this recognition and respect:

. . . [T]he legislation is a singular paradox in Canadian law — a statute originally and still based on respect for religion, which imposes a serious disability on persons of other non-conforming religions and in doing so displays a callous indifference to true religious principles.

It is a distinct irony of history that the religious community which originated the concept of one day's rest in seven and gave it to the world should in this country wind up with its own adherents penalized and suffering a kind of religio-economic discrimination for observing this very historical precept — because a statute was enacted stemming from the religious ideal. This is a disability which seriously detracts from the vaunted religious freedom of our society and our law.⁴⁶

⁴⁵Extracted from a brief submitted by the Christian Labour Association of Canada on January 29, 1970.

⁴⁶Extracted from a brief submitted by the Canadian Jewish Congress (Central Region) on April 17, 1970.

In the same vein, the Ontario-Quebec Conference of the Seventh-day Adventist Church, representing approximately 5,000 adherents in the province of Ontario, submitted their views to us concerning the religious aspects of Sunday:

A conviction that the Seventh day of the week (Saturday) is the only day of religious worship referred to in the Bible and observed by Christ and His disciples, leads Seventh-day Adventists to observe the Sabbath from sundown Friday night to sundown Saturday night. The Biblical teaching of the literal, visible, and physical return of Christ to this earth and the need for men and women to prepare for this cataclysmic triumph of the Christian faith is the other salient doctrine summed up in the name. . . .

Seventh-day Adventists have been unable to find any warrant in the Bible for the observance of Sunday either as a holy rest day of religious obligation or as a day possessing any quality that requires observance in any different manner than the other five working days of the week. Indeed, Adventists believe that the founder of Christianity spoke wisely and well when he delineated the separate spheres of the sacred and the profane by admonishing his followers to "give to Caesar what belongs to Caesar and to God what belongs to God." (St. Matthew 22:21, N.E.B.)

Again, the New Testament Scriptures record the occasion when the critics of Jesus attempted to charge him with the desecration of the Sabbath with this rather contemporary allegation, "There, you see, your disciples are doing what the law forbids them to do on the Sabbath." And Jesus answered — "the Son of Man is Master even of the Sabbath — you see it is right to do good on the Sabbath day." (St. Matthew 12:2, 8, 12 N.E.B.)⁴⁷

Similar views were submitted by the Seventh-day Adventist Reformed Church (Eastern Canadian Conference) and the Ottawa Seventh-day Adventist Church.

Therefore, it would appear that the ancient controversy concerning the religious nature of Saturday and Sunday as special days is still very much alive in Ontario in 1970. Far more Ontarians, of course, would say that Sunday, rather than Saturday, has special religious significance, but this is not an absolute position and would seem to vary in intensity from Church to Church, and from individual to individual.

For example, both the Toronto and Kitchener Monthly Meetings of the Religious Society of Friends (Quakers) told us that they believed the whole of life to be sacramental and that Sunday was not in itself more holy than any other day even though that was the day set aside for worship and rest. And another group of

⁴⁷Extracted from a brief submitted by the Ontario-Quebec Conference of the Seventh-day Adventist Church on April 15, 1970.

Christians represented by Mr. Gordon A. Rainbow pointed to the religious background of both Saturday and Sunday and suggested that the government should enact legislation to preserve the freedom of Sunday as the day of worship for all Christians and to prescribe Saturday as the day of rest for all men.

Quite apart from any diversity of opinion respecting the religious significance of Saturday and Sunday as special days, there remain to be considered the various theological positions concerning the extent to which the state is obligated or permitted to support this aspect of religious observance (of the majority or the minority) through law. It was noted earlier that one of the primary objects of the federal *Lord's Day Act* of 1906 was to give sanction to the divine Christian precept of the Lord's day as a day of rest. Of contemporary significance to the matter of whether the state has a religious obligation in general is the following statement emanating from the World Council of Churches Conference on Church and Society held in Geneva, Switzerland in 1966. This Conference was participated in, and therefore has considerable support from, Orthodox, Anglican and Protestant Christians:

The state is responsible to God and men for its exercise of power. As Christians we should call it to that responsibility. Without absolutizing our own judgments or claiming to know fully God's will, we must declare that he does judge any unjust use of power. The state has the function of serving all its citizens. This includes the obligation to make provision for free discussion and criticism. We recognize the desirability of different political structures and institutions in varied situations and stages of development, all subject to the same will and purpose of God.

The authentic Christian concern for the state is that it implement human welfare. We ask that the state serve persons-in-community. As Christians living within the state we recognize a calling to a ministry of reconciliation that goes beyond its laws and structures, but may not seek false reconciliation at the cost of justice. We recognize also that the fundamental Christian concern is for the weak and oppressed in any society.⁴⁸

• Relating more specifically to the question of state support for the religious aspects of Sunday observance, reference may be had again to the established doctrines of the Presbyterian Church in Canada and the Canadian Reformed Churches:

Presbyterian Church in Canada: 1955 General Assembly

Declaration of Faith Concerning Church and Nation

In its ordained service of God, the State has a three-fold duty to the Church. It has the duty of establishing public peace and providing protection, guarding impartially the rights of every citizen.

⁴⁸These two paragraphs are from the report of the section of the Conference dealing with the Nature and Function of the State in a Revolutionary Age (1966), pp. 117-118.

It owes to the Church in all her branches, without partiality, the recognition of her office and of her consequent right to due resources, time, and opportunity, for the public worship of God, for the education of her children in His truth, and for the evangelizing of the Nation. It must pay serious attention whenever its office-bearers are addressed by the Church in the name of the Lord Jesus concerning the kingdom of God and His righteousness.⁴⁹

Canadian Reformed Churches

The Magistracy (Civil Government)

We believe that our gracious God, because of the depravity of mankind, has appointed kings, princes, and magistrates; willing that the world should be governed by certain laws and policies; to the end that the dissoluteness of men might be restrained, and all things carried on among them with good order and decency. For this purpose He has invested the magistracy with the sword for the punishment of evil-doers and for the protection of them that do well.

Their office is not only to have regard unto and watch for the welfare of the civil state, but also that they protect the sacred ministry, that the Kingdom of Christ may thus be promoted. They must therefore countenance the preaching of the Word of the gospel everywhere, that God may be honoured and worshipped by everyone, as He commands in His Word. . . .⁵⁰

The combined brief submitted by the Anglican and Roman Catholic Dioceses of Toronto alluded to the obligation of the state to support the divine precept of the Lord's day:

It is recognized that the use of Sunday as a day of religious observance has proportionately declined in comparison to its use as a day of rest and relaxation but we still feel that the desires of a very substantial portion of our population which comprises the Christian community are entitled to continued recognition by the state.⁵¹

Another aspect of the state's obligation to support Sunday as a religious day relates to Sunday school. The following views were put forward in a brief by Bishop J. A. Watton of the Anglican Diocese of Moosonee:

Sunday is also a day in which at least a minimum training in religious knowledge can be offered to the young. This offering

⁴⁹Extracted from the Declaration of Faith concerning Church and Nation which was approved by the Church's 1955 General Assembly. Since it is a "Declaration of Faith", it enjoys a higher status than the statements reproduced earlier (footnotes 35-37).

⁵⁰Extracted from Article 36 of the Confession of Faith to which all communicant members of the Canadian Reformed Churches have to subscribe by their Profession of Faith.

⁵¹Extracted from a brief submitted by the Anglican and Roman Catholic Dioceses of Toronto on April 17, 1970

is made by adults, working on a voluntary basis with the context of their Sunday . . . their "free day". [For the state] . . . to put in jeopardy this "free day" is to withdraw this teaching facility.

It would seem odd, at a time when pressures are being applied to the Educational System to remove religious education from the curriculum in Public Schools; on the basis that such education should be given within the context of the religious denomination . . . that other pressures are being applied to make it difficult, if not impossible, to implement even this action.⁵²

An opposite position regarding the state's obligation to support the Christian precept of the Lord's day was contained in the brief from the Mennonite Conference of Ontario which espoused the principle of complete separation of Church and state. Yet while the Conference did not favour the passing of laws governing the religious observance of Sunday, they did recommend that Sunday should be declared a weekly holiday with the manner of its observance being optional, as a method of guaranteeing a day of rest for all. The Toronto, Kitchener, and Hamilton Monthly Meetings of the Religious Society of Friends (Quakers) espoused basically the same position.

Perhaps more significant was the apparent moving away of the Lord's Day Alliance of Canada from its earlier position of the period 1888-1906, as evidenced by their current position set forth in the following extracts from their brief:

While it is obvious that the cessation of work on Sunday makes it more possible for people to attend services of public worship than any other rest day system would allow (and this is desirable), we wish to affirm that The Lord's Day Alliance of Canada has never asked for Sunday observance legislation as a concession to churches. Any request which has been made by our body has been based upon philanthropic grounds. As in the past, so also in the present we waive consideration for the churches if it can be successfully shown that Sunday observance is bad for society. We certainly ask for no sectarian advantage. In this sense we do not ask society or any legislative body to do something for religion. On the other hand, we ask for recognition of the good that pure religion does for society. Religion promotes private integrity and idealism; it cultivates concern for others; it enjoins upon its adherents an attitude of responsibility toward the state; and it makes for lawful behaviour, order and good government. Your Commission is, therefore, well advised to take this matter into account.⁵³

The position of the Evangelical Fellowship of Canada, representing 7,000 individual members, 2,700 clergymen and 200 affiliated con-

⁵²Extracted from a brief submitted by J. A. Watton, Bishop of the Anglican Diocese of Moosonee on January 23, 1970.

⁵³Extracted from a brief submitted by the Lord's Day Alliance of Canada on February 1, 1970.

gregations drawn from 20 Protestant denominations, was similarly reluctant to characterize existing or future Sunday observance legislation as primarily imposing a Christian precept, although their view was purposely consistent with the religious views of the majority of Canadians:

(a) From the religious point of view, all Christian churches with the exception of a few small denominations observe Sunday as a day of religious obligation. There is a consensus (sic) among all Christian bodies that this obligation consists in refraining from ordinary work subject to certain reasonable exceptions and performing certain religious duties, especially attendance at public worship. Thus, so far as the churches are concerned, it is desirable that the common day of rest be observed on Sunday.

(b) This preference, of course, may not be conclusive. In a community where Christians are in the minority, the state may well argue that some other day ought to be observed, particularly if a majority of the citizens are members of a religion which observes another day as holy. Thus in Israel, Saturday is observed as the weekly day of rest.

However, in Canada the majority of citizens profess the Christian faith. According to the 1961 census over 96% of the people living in Canada claimed to be adherents of some Christian church which observes Sunday as its holy day. We do not infer from this that the state ought to require all people to attend Christian worship on Sunday but only that Sunday is the most appropriate day to be observed as a common weekly day of rest. The argument may be put as follows:

- (i) In pursuing the welfare of its citizens, the state ought to provide for a common weekly day of rest.
 - (ii) In performing this duty to its citizens, the state ought to accommodate the majority of its citizens.
 - (iii) In Canada, the majority of people claim to be members of churches which favour observing Sunday as the common day of rest.
 - (iv) Therefore in Canada the state should prescribe that Sunday be observed as a common weekly day of rest.
- (c) This argument, of course, does not amount to favouring any one religion. It merely advocates the selection as a common day of rest of that day which will permit the greatest number of persons with religious convictions to perform their obligations free of undue economic pressure. Since there is no one day which will satisfy everyone in the community, an attempt should be made to accommodate the greatest possible number.⁵⁴

⁵⁴Extracted from a brief submitted by the Evangelical Fellowship of Canada on March 16, 1970.

The strongest position against state enactment or support of any religious legislation was submitted by the three Seventh-day Adventist Church groups⁵⁵ and the two private individuals appearing⁵⁶ who were adherents of that faith. While they agreed generally that a "pause day" or a "rest day", quite apart from any question of religious observance, had distinct benefits for all citizens, it was the selection of the Lord's day as that day which inflicted on them, by way of effect, the unwanted religious consequences respecting their Sabbath.

In the final analysis, it is impossible to draw absolute and opposing positions on this matter. The extent to which the principles and doctrines of the Christian, Jewish, or even Moslem religions coalesce with legislative policies that are deemed desirable as a secular matter is, in many respects, only a measure of the virtue of these various religions as seen by their adherents. While the federal *Lord's Day Act* was decidedly Christian legislation as a matter of its primary purpose, one might suggest that some of the policies which it promoted would have been equally desirable in an agnostic as well as a Christian state. If the day of rest selected in the Act had been, say, Wednesday, neither the Jews nor the Seventh-day Adventists who observe Saturday, nor the Moslems who observe Friday, would have been overly concerned. Yet because Sunday was chosen as the day when most Christians observe, and because the term "Lord's day" was used, the legislation was automatically regarded as religious, regardless of any secular benefits for the whole of society.

In short, it appears to us that the difference between religious legislation and secular legislation is really one of degree and emphasis, rather than kind. The theological positions stated by many of the Christian Churches appearing at the public hearings, seemed to be moving away from the nineteenth century position of state support for the divine Christian precept of the Lord's day towards a twentieth century viewpoint which emphasized desirable sociological effects which incidentally were in accord with the religious view of the majority of Ontarians. Admittedly, the distinctions between these two might be more apparent than real to the casual observer, but we consider it to be of major importance.

⁵⁵The Ontario-Quebec Conference of the Seventh-day Adventist Church, the Seventh-day Adventist Reform Church and the Ottawa Seventh-day Adventist Church.

⁵⁶Gerald Grimaud and Paul Lee.

CHAPTER 5

THE ECONOMIC BACKGROUND OF SUNDAY OBSERVANCE IN ONTARIO AND THE IM- PLICATIONS OF SUNDAY OPERATION IN VARIOUS BUSINESSES

S U M M A R Y

- A. EXISTING EMPLOYMENT PATTERNS AS THEY RELATE TO SUNDAY
- B. TRADE UNIONS, COLLECTIVE BARGAINING AND CONDITIONS OF SUNDAY EMPLOYMENT
- C. SUNDAY RETAILING: SALES, PRICES AND PROFITS
 - 1. Food Stores
 - 2. Discount Stores
 - 3. Department Stores
 - 4. Automotive Stores and Dealers
 - 5. Services and Institutions Ancillary to Retail Selling
 - (a) Food
 - (b) Department and Discount Stores
- D. RECENT TRENDS IN RETAILING AND THEIR FUTURE IMPLICATIONS FOR SUNDAY
- E. THE RELATED QUESTION OF EVENING AND STATUTORY HOLIDAY RETAILING
- F. CONTINUOUS PROCESS INDUSTRIES

This chapter involves a general analysis of certain economic factors as they relate to Sunday laws: the number of employees who now work Sundays; the state of the collective bargaining system respecting Sunday employment; past, present and future trends in retailing and service industries, and the implications of Sunday openings; and manufacturing and processing industries which have traditionally carried on Sunday operations. In one sense, this analysis will describe the Ontario economy as of 1970. In another sense it will attempt to project into the future, based on certain conditions that may or may not come about. However, it must be clearly understood that this chapter does not purport to draw conclusions or make recommendations with respect to specific problems. It is only intended to provide a factual background against which the viability of the alternatives and proposals set forth in a later part of the report can be measured.

A. EXISTING EMPLOYMENT PATTERNS AS THEY RELATE TO SUNDAY

There are no available statistics as to the total number or percentage of the Ontario work force who work regularly on Sunday. However, the Dominion Bureau of Statistics has supplied a Canada-

wide table showing the number and percentage of paid workers in 1967 who usually work on Sundays.¹ This document indicates that 13.9% of the employed work force falls into this category. In other words, at least one out of every eight employed Canadians that year could expect to go to work regularly on Sundays. The highest percentage of Sunday workers was recorded in the fields of agriculture (31.2%), community, business and personal services (27.5%), and transportation, storage, communication, electric power, gas and water utilities (20.1%), while the lowest percentages were recorded in construction (3%), trade (4.5%), and finance, insurance and real estate (4.6%). While the high percentages in agriculture or transportation and utilities are not surprising since these have been traditionally regarded as "necessity" industries with a high Sunday work content, the 27.5% of persons employed in community, business and personal services is significantly high. This too can be explained by the fact that persons employed in health and welfare services, religious organizations, motion picture and recreational services, and all forms of cultural and entertainment activities would be included here.

The Social Survey Research Centre, our researchers retained to conduct a province-wide attitude survey, inquired of 502 persons in Ontario (by personal interview with respondents randomly selected across Ontario and with results corrected and weighted by age, sex

¹Table I.

NUMBERS AND PERCENTAGE OF PAID WORKERS WHO USUALLY WORK ON SUNDAY IN CANADA

Information supplied by Mr. N. K. Tandan of the Dominion Bureau of Statistics, Ottawa.

[Note: This table shows figures for the whole of Canada. There is no breakdown available on a province-by-province basis.]

*Paid (does not include self-employed) Workers at Work at their Principal Job (does not include "moonlighting jobs") during the Week Ended June 17, 1967, by Industry, Showing Number Who Usually** Work on Sundays, Canada.*

(Estimates in Thousands)

Industry	Total		Usually Work on Sunday	
	No.	%	No.	%
All Industries	6,158	100.0	858	13.9
Agriculture (Experimental and Institutional Farms, Small Agricultural Holdings, Commercial Farms, Services Incidental to Agriculture)	112	100.0	35	31.2*
Forestry (Logging and Forestry Services)	73	100.0	--	n.a.
Fishing and Trapping	10	100.0	--	n.a.
Mines, Quarries and Oil Wells (Metal Mines, Mineral Fuels, Non-Metal Mines, Quarries and Sand Pits, Services Incidental to Mining)	109	100.0	16	14.7

and city size according to D.B.S. census data) how many of their family members in their household worked at a paying job on Sunday. Their results showed that 76% of all respondents had no members of their family working on Sunday, 21% with one member of their family working on Sunday, 2% with two members and 1% with three members working Sunday (total of 24% with one or more persons working Sunday). If one assumes as a fair estimate that the average Ontario family has 2.1 members over 18 who are working, and "corrects" the 24% by dividing it by this number to eliminate the family multiplier effect, the result would be 11.4% of those working would work on Sundays. This figure is

Industry	Total		Usually Work on Sunday	
	No.	%	No.	%
Manufacturing (Food and Beverage Industries, Tobacco Products Industries, Rubber Industries, Leather Industries, Textile Industries, Knitting Mills, Clothing Industries, Wood Industries, Furniture and Fixture Industries, Paper and Allied Industries, Printing, Publishing and Allied Industries, Primary Metal Industries, Metal Fabricating Industries, Machinery Industries, Transportation Equipment Industries, Electrical Products Industries, Non-Metallic Mineral Products Industries, Petroleum and Coal Products Industries, Chemical and Chemical Products Industries, Miscellaneous Manufacturing Industries)	1,653	100.0	123	7.4
Construction (Building Construction, Highway, Bridge and Street Construction, Other Construction, Special-Trade Contractors)	396	100.0	12	3.0
Transportation, Storage, Communication, Electric Power, Gas and Water Utilities	608	100.0	122	20.1*
Trade (Wholesale and Retail Trade)	964	100.0	43	4.5
Finance, Insurance, Real Estate	285	100.0	13	4.6
Community, Business and Personal Service (Education and Related Services, Health and Welfare Services, Religious Organizations, Motion Picture and Recreational Services, Services to Business Management, Personal Services, Miscellaneous Services)	1,502	100.0	413	27.5*
Public Administration (Federal, Provincial and Local Administration, and other Government Offices)	445	100.0	71	16.0*

*Note for special significance.

**Respondents selected at random were asked: "Do you usually work Sundays at your principal job?" The statistics herein reflect their responses, magnified on a national scale in accordance with population distribution.

--Less than 10 thousand.

remarkably close to the total percentage provided by the D.B.S. for the whole of Canada and is consistent with the hypothesis that approximately one out of eight employed persons in Ontario usually works on Sunday.

Table II² indicates the changing nature of the Ontario labour force. The number and percentage of employees engaged in agriculture has been steadily decreasing while those in non-agriculture has been drastically increasing. For example, in 1946, 18.9% of the Ontario labour force was engaged in agriculture, while in 1969 it

²Table 11.

BREAKDOWN OF ONTARIO LABOUR FORCE BY SEX, AGE GROUP, AND

(estimates in thousands)

	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956
<u>Labour Force</u>											
Total.....	1,702	1,759	1,776	1,815	1,826	1,870	1,908	1,948	2,022	2,059	2,147
Agriculture.....	321	301	291	286	255	239	229	221	254	238	215
Non-agriculture.....	1,381	1,458	1,486	1,530	1,571	1,631	1,680	1,727	1,768	1,821	1,932
Men.....	1,285	1,341	1,364	1,388	1,395	1,426	1,454	1,487	1,526	1,545	1,586
Agriculture.....	275	251	250	252	234	216	207	207	239	224	202
Non-agriculture.....	1,009	1,089	1,113	1,136	1,161	1,210	1,248	1,280	1,287	1,321	1,384
Women.....	417	419	413	427	430	444	454	461	496	514	560
Agriculture.....	46	50	40	34	21	23	22	14	16	14	13
Non-agriculture.....	371	369	372	394	410	422	432	447	480	500	548
All ages.....	1,702	1,759	1,776	1,815	1,826	1,870	1,908	1,948	2,022	2,059	2,147
14-19 years.....	192	197	184	186	175	179	174	169	177	178	184
20-24 years.....	223	237	241	248	243	244	242	246	245	244	250
25-44 years.....	727	755	771	798	812	841	876	903	946	975	1,014
45-64 years.....	473	481	491	493	505	518	526	542	564	575	604
65 years and over.....	87	90	90	91	91	89	92	88	89	86	95
<u>Persons with jobs</u>											
All ages.....	1,661	1,732	1,749	1,778	1,788	1,843	1,874	1,914	1,951	1,998	2,103
14-19 years.....	184	192	177	177	168	172	166	163	164	168	177
20-24 years.....	214	231	235	241	236	239	236	240	234	236	243
25-44 years.....	712	747	764	785	800	833	864	890	916	952	997
45-64 years.....	467	475	485	486	495	512	518	534	549	559	593
65 years and over.....	85	88	88	89	89	88	90	86	87	83	93

was 4.6%. Considering just those persons with jobs, in 1946 19.3% were engaged in agriculture, while in 1969 it was 4.7%. These statistics are relevant to the question of Sunday in that the field of agriculture, which has the highest Sunday work content, is involving proportionately fewer and fewer people.

The third area which bears indirectly on the Sunday question is the extent to which the proportion of the Ontario labour force in service industries is increasing, while the proportion in production, manufacturing, and construction is decreasing. This is indicated in Table

AGE GROUP OF THOSE EMPLOYED, FOR PERIOD 1946-1969

SPECIAL SURVEYS DIVISION DOMINION BUREAU OF STATISTICS												
1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
2,234	2,255	2,290	2,367	2,393	2,412	2,464	2,556	2,614	2,719	2,834	2,934	3,032
193	178	177	180	167	161	173	162	153	142	149	146	139
2,041	2,077	2,113	2,187	2,225	2,250	2,290	2,394	2,461	2,577	2,685		2,893
1,641	1,668	1,681	1,706	1,711	1,719	1,746	1,780	1,817	1,869	1,929	1,984	2,032
180	162	163	163	151	142	151	140	132	120	123	120	115
1,460	1,506	1,517	1,543	1,559	1,578	1,595	1,640	1,684	1,749	1,805	1,864	1,916
593	588	610	661	682	692	718	776	798	850	906	951	1,000
13	16	14	18	16	20	22	22	21	22	24	26	24
580	572	596	643	666	673	695	754	777	828	880	925	976
2,234	2,255	2,290	2,367	2,393	2,412	2,464	2,556	2,614	2,719	2,834	2,934	3,032
188	179	192	202	195	200	217	231	240	254	270	282	279
257	264	261	265	270	267	275	284	298	328	357	385	412
1,057	1,071	1,083	1,111	1,114	1,114	1,121	1,158	1,174	1,210	1,252	1,284	1,334
634	650	665	699	726	743	768	788	814	838	872	898	922
97	92	90	89	87	87	82	94	90	89	84	86	84
2,164	2,143	2,195	2,239	2,261	2,308	2,370	2,473	2,548	2,651	2,745	2,830	2,936
176	159	174	180	174	181	197	211	224	237	248	255	256
245	245	248	247	251	253	261	273	288	318	343	367	396
1,030	1,026	1,045	1,061	1,063	1,075	1,088	1,130	1,153	1,189	1,221	1,250	1,304
619	624	641	666	691	715	744	768	796	821	852	875	900
95	89	87	86	82	83	80	92	87	86	82	83	81

III.³ For example, 58.2% of Ontario's working population in 1969 was engaged in service industries, and only 41.8% in production, manufacturing and construction, while the same figures for 1960 (on a Canada-wide basis) were 53.5% service and 46.5% production, manufacturing and construction. This is a result of automation and industrial efficiency. However, a result of this shift to service jobs is that the capital investment in machinery to provide one man with a job in production, manufacturing and construction is now considerably greater than it was a few years ago, thus causing an increased demand by industry to operate their plants on a continuous production basis as a matter of economic and sometimes technical necessity. Thus the decrease in the percentage of the work force in

³Table III.

ONTARIO'S TOTAL EMPLOYED LABOUR FORCE BY
INDUSTRY AND OCCUPATION,

12-month averages 1969

(Estimates in Thousands)

By Industry (1960 Standard Industrial Classification)	Employed	
	Number	Per Cent
All Industries	2,936(i)	100.0
Agriculture	136	4.6
Other Primary	48	1.6
Manufacturing	862	29.4
Construction	182	6.2
Transportation, communication and other Utilities	222	7.6*
Trade	472	16.1*
Finance, insurance, real estate	143	4.9*
Community, business and personal service	691	23.5*
Public administration	178	6.1*

By Occupation (1961 Census Occupational Classification)		
All Occupations	2,936	100.0
Managerial	286	9.7
Professional and Technical	400	13.6
Clerical	481	16.4
Sales	202	6.9
Service and recreation	320	10.9
Transport and communication	142	4.8
Farmers and farm workers	138	4.7
Other Primary	25	0.9
Craftsmen, production process and related workers	813	27.7
Labourers and unskilled workers (not agricultural, fishing, logging or mining)	129	4.4

(i) Figures may not add to totals due to rounding.

SOURCE: Dominion Bureau of Statistics; Special Surveys Division.

*Assuming that all these industries involve what are termed service industries, we can conclude that in 1969, 58.2% of Ontario's working population were engaged in service industries and only 41.8% in production. On a Canada-wide basis for the same year, the breakdown was 60.7% service and 39.3% production. For the year 1960 on a Canada-wide basis, the breakdown was 53.5% service and 46.5% production.

production, manufacturing and construction is inversely proportional to the resulting demand for continuous production, which in many cases obliterates the notion of a uniform pause day on Sunday in those industries. In Ontario in 1966,⁴ there were 12,986 manufacturing establishments employing 820,387 persons, 453,888 of whom were engaged in actual production work, meaning that the impact of a trend towards continuous production and the elimination of the uniform Sunday pause day would be substantial.

Employment statistics in the retail trade in Ontario are also significant because it would be this group that would be most directly affected by any legislative move towards an open commercial Sunday. Table III indicates that 16.1% of the Ontario labour force in 1969 was engaged in some aspect of the wholesale or retail trade and that 6.9% classified themselves as being engaged in sales, by occupation. In real numbers, this would be 472,000 in trade and 202,000 in sales. A breakdown of the bulk of this group engaged in retail trade is given for 1961 in Table IV⁵ (by kind of business) and V⁶ (by employment size) by which it can be seen that over half of the stores in the province employed two or fewer people, but collectively accounted for only 13% of the sales in the province. But at the other extreme, almost half of the paid retail employees worked in stores employing 21 or more people, and these stores, few in number (3.2%), accounted for 39.4% of the sales. Thus, a few large firms employing many persons do a high proportion of the retail volume in Ontario, particularly in the food and general merchandise groups. Any move towards Sunday opening by these large firms would directly affect the employment patterns of a great many people in Ontario.

⁴Manufacturing Industries of Canada, Section D, Ontario, 1966, Dominion Bureau of Statistics, Catalogue No. 31-206, December 1969.

⁵Table IV.

RETAIL TRADE BY KIND OF BUSINESS, ONTARIO 1961*

Kind of Business	Number of Stores	Sales	Inventory at End of Year	Number of Working Proprietors	Number of Paid Employees
		(000)	(000)		
Total, all stores	52,157	6,206,684	733,954	44,339	233,563
Food	12,876	1,638,917	83,974	12,020	46,491
General Merchandise	3,078	857,884	121,504	2,082	65,252
Automotive	13,113	1,816,830	179,535	12,563	49,681
Apparel and Accessories	6,914	449,275	122,216	4,873	22,663
Hardware and Home Furnishings	6,257	443,326	103,113	5,062	17,556
Other (florists, music, gift, pet, liquor, sporting goods)	9,919	1,000,450	123,610	7,739	31,920

*Source: Dominion Bureau of Statistics.

There are no available statistics as to the premium wage rates paid to people now working on Sunday in Ontario except in specific industries where rates are set by collective bargaining agreements. These will be dealt with in the next section. Also, there are no statistics dealing with the extent to which Sunday employees are given a day of rest at some other time during the week.

In summary, then, it would appear that one out of eight persons employed in Ontario usually goes to work on Sunday, and that these persons are most often engaged in (1) agriculture; (2) community, business and personal services; or (3) transportation, communications and other utilities. The proportion of those in the work force engaged in agriculture is decreasing rapidly, but there is no reason to believe that this is the case in the other two classifications, and it is more likely the proportion will continue to increase. The numbers engaged in production, manufacturing and construction are decreasing, but the high capital cost of automation might well result in increased demands for continuous production and the non-observance of any uniform Sunday pause day. The retail trade employs a significant proportion of the work force, and a large number of these are employed by a few large firms accounting for a high proportion of the retail sales in Ontario. Any decision of these few large firms towards Sunday opening will likely have a radiation effect on Sunday retail employment.

⁶Table V.

RETAIL TRADE FOR ALL STORES BY EMPLOYMENT SIZE,
ONTARIO 1961*

Employment Size	Stores		Sales		Working Proprietors		Paid Employees	
	Number	%	Amount (000)	%	Number	%	Number	%
0	244	0.5	14,258	0.2	—	—	—	—
1	15,103	28.9	326,743	5.3	14,322	32.3	781	.3
2	11,811	22.6	483,062	7.8	11,490	25.9	12,132	5.2
3	7,373	14.1	459,373	7.4	6,922	15.6	15,197	6.5
4	4,933	9.5	418,875	6.8	4,373	9.9	15,359	6.6
5 - 9	8,520	16.3	1,190,294	19.2	6,221	14.0	47,144	20.2
10 - 14	1,765	3.4	523,087	8.4	699	1.6	19,686	8.4
15 - 19	761	1.5	341,508	5.5	194	0.4	12,549	5.4
20 - 49	1,180	2.3	1,005,836	16.2	106	0.2	35,261	15.1
50 - 99	351	0.7	690,810	11.1	9	—	23,399	10.0
100 +	116	0.2	752,835	12.1	3	—	52,055	22.3
TOTAL	52,157	100.0	6,206,684	100.0	44,339	100.0	233,563	100.0

*Source: Dominion Bureau of Statistics.

B. TRADE UNIONS, COLLECTIVE BARGAINING AND CONDITIONS OF SUNDAY EMPLOYMENT

On several occasions during the public hearings, we were told that the trade unions would look after the regulation of Sunday employment in respect of premium rates, guaranteeing alternative days off through the week, part-time/full-time employee ratios, and related matters, and that government regulation was unnecessary. This position is tenable only to the extent that trade unions do in fact represent and bargain collectively on behalf of employees who now or potentially may work on Sundays. Therefore, it is proposed here to examine briefly the nature of union membership in the Ontario labour force in an attempt to illustrate the extent to which the trade unions are or would be capable of regulating conditions of Sunday employment.

Table VI⁷ indicates that trade union membership in Ontario in 1969 was 25.6% of the total labour force, while in 1960 it was 23.9%. If one eliminates those engaged in agriculture and those who are unemployed, the figures are 30% for 1969 and 30.3% for 1960. Therefore, it is possible to say that at least one out of every four persons employed in Ontario is a member of a trade union.

⁷Table VI.

TRADE UNION STATISTICS FOR ONTARIO — BY UNION AND BY INDUSTRY

UNION MEMBERSHIP IN ONTARIO AS A PER CENT OF THE TOTAL LABOUR FORCE
AND NON-AGRICULTURAL PAID EMPLOYEES, 1960-1969

Year	Union Membership	Total Labour Force	Non- Agricultural Paid Employees	Union Membership as a Per Cent of	
				Total Labour Force	Non- Agricultural Paid Employees
1960	556,200	2,328,000	1,837,000	23.9	30.3
1961	550,000	2,381,000	1,845,000	23.1	29.8
1962	538,700	2,369,000	1,882,000	22.7	28.6
1963	553,000	2,388,000	1,921,000	23.2	28.8
1964	577,100	2,478,000	2,000,000	23.3	28.8
1965	614,900	2,555,000	2,114,000	24.1	29.1
1966	655,500	2,609,000	2,167,000	25.1	30.2
1967	721,600	2,718,000	2,304,000	26.5	31.3
1968	716,200	2,804,000	2,372,000	25.5	30.2
1969	753,500	2,947,000	2,511,000	25.6	30.0

Sources: "Industrial and Geographic Distribution of Union Membership in Canada", Economics and Research Branch, Canada Department of Labour, and "Labour Force Statistics" Special Surveys Division, Dominion Bureau of Statistics.

However, when one examines in Table VII⁸ trade union membership in 1969 by industry breakdown, we see that over half of all union membership is located in the manufacturing sector (where there is not a high preponderance of Sunday employment as indicated in Table I), whereas wholesale and retail trade account for only 2.1% of union membership, service industries 8.2%, and transportation and utilities another 14.8%. In 1962 and subsequent years, the distribution of union membership among these various industry sectors was much the same. While Table VII does not indicate the extent of union membership within each industry sector as a percentage of all employees within that sector, it is possible to make comparisons with Table III wherein it was shown that in 1969 the wholesale and retail trade sector accounted for 16.1% of the total employed labour force (as compared with only 2.1% of the trade union membership); community, business and personal services accounted for 23.5% of

⁸Table VII.

UNION MEMBERSHIP IN ONTARIO BY INDUSTRY, 1962-1969(a)

Industry Division	Union Membership							
	1962		1963		1964		1965	
	No.	%	No.	%	No.	%	No.	%
Agriculture	—	—	—	—	—	—	—	—
Forestry	10,600	2.0	10,252	1.8	9,717	1.7	9,600	1.6
Mining	16,657	3.1	18,996	3.4	16,994	3.0	20,769	3.4
Manufacturing	273,340	50.7	283,834	51.3	303,450	52.6	333,283	54.2
Construction	59,717	11.1	62,398	11.3	64,878	11.2	65,473	10.6
Transportation & Utilities	106,570	19.8	104,512	18.9	103,902	18.0	104,378	17.0
Trade	8,853	1.6	9,875	1.8	10,049	1.7	11,617	1.9
Finance	—	—	—	—	—	—	—	—
Service Industries	32,491	6.0	33,074	6.0	36,097	6.3	39,700	6.4
Public Administration	25,131	4.7	25,820	4.7	27,780	4.8	28,015	4.6
Industry not Reported	5,314	1.0	4,251	0.8	4,274	0.7	2,049	0.3
TOTAL	538,673	100.0	553,012	100.0	577,141	100.0	614,884	100.0

	1966		1967		1968		1969	
	No.	%	No.	%	No.	%	No.	%
Agriculture	—	—	86	(b)	90	(b)	91	(b)
Forestry	10,685	1.6	9,612	1.3	10,545	1.5	8,994	1.2
Mining	20,465	3.1	19,364	2.7	19,156	2.7	18,820	2.5
Manufacturing	360,609	55.0	377,448	52.3	370,759	51.7	377,644	50.1
Construction	74,668	11.4	80,857	11.2	78,505	11.0	85,208	11.3
Transportation & Utilities	103,224	15.7	110,724	15.4	110,070	15.4	111,371	14.8
Trade	13,147	2.0	14,826	2.1	15,039	2.1	15,785	2.1
Finance	—	—	10	(b)	10	(b)	9	(b)
Service Industries	42,280	6.5	51,401	7.1	56,045	7.8	61,678	8.2
Public Administration	28,623	4.4	55,608	7.7	54,156	7.6	72,257	9.6
Industry not Reported	1,768	0.3	1,650	0.2	1,787	0.2	1,656	0.2
TOTAL	655,469	100.0	721,586	100.0	716,162	100.0	753,513	100.0

(a) Data not available for 1960 and 1961.

(b) Less than 0.05 per cent.

Source: Prepared from data provided by the Economics and Research Branch, Canada Department of Labour.

the total employed force (as compared with only 9.6% of trade union membership); and transportation, communication and other utilities accounted for 7.6% of the total employed labour force (as compared with 14.8% of trade union membership). Therefore, in the three industry sectors where there is a high or potentially high preponderance of Sunday work, the trade and service industries are not highly unionized as compared with other sectors, while the transportation and utilities sector is unionized to a greater degree than the other sectors. Manufacturing employees, a portion of whom are employed on Sundays in continuous process industries, would appear to be highly unionized (29% of the employed labour force representing 50.1% of the trade union membership), as is also the case with construction employees, who rarely engage in Sunday work (6.2% of the employed labour force constituting 11.3% of the union membership).

Finally, of peripheral importance is the fact that there is a marked trend towards membership in the larger unions away from the smaller unions. In 1960, 49.5% of all union members belonged to unions with 10,000 or more members, while in 1969 the percentage increased to 62.6%⁹ At the lower level, in 1960, 3.8% of union members belonged to a union having under 1,000 members, while in 1969 this figure decreased to 2.2%.¹⁰ The significance of this for Sunday is that the positions taken by a few large unions, particularly in the retail trade, respecting Sunday employment conditions will have a significant effect on all potential Sunday workers.

In summary then, it would appear that at least one out of four persons employed in Ontario belongs to a trade union. In terms of industries where Sunday work is not uncommon, manufacturing, transportation and utilities would appear to be unionized to a greater degree than average, while retail and wholesale trade and service industries are unionized to a lesser degree. And the larger unions in all industry sectors, but particularly in retail trade, occupy an increasingly important role.

Concentrating on the employees in Ontario engaged in retail and wholesale trade (the employees who might well be affected the most if Ontario were to adopt an open commercial Sunday), Table III indicates that there are 472,000 persons employed in this industry sector. The Ontario Federation of Labour in its brief to us¹¹ advised that trade union membership in the retail trade and allied industries was in the neighbourhood of 45,000 workers, or 9.5% of the entire industry sector. This figure was borne out in discussions between our researcher and union leaders, wherein it was estimated that the proportion of retail employees in the province who are unionized is "no more than 10%". The service industries such as laundry and dry cleaners are not unionized generally, nor are the major department stores, the automotive and appliance dealers and the clothing and

⁹Supplied by the Research Branch of the Ontario Department of Labour; prepared from data provided by the Economics and Research Branch of the Canada Department of Labour.

¹⁰*Ibid.*

¹¹Brief submitted to us on February 5, 1970.

shoe stores. Most of the 9.5% who are organized can be found in the food industry, particularly the supermarket chains, where all but one major chain are unionized. A labour relations official of one of the large supermarket chains estimated that 70–80% of all employees engaged in food retailing in the province were unionized.¹² This would appear to be a significant fact in view of the possible pre-disposition among some food retailers for Sunday openings, as opposed to other retail groups. It might well be that those unionized employees in food retailing are well-protected by the unions if their employers decide to open Sundays. For example, most of the union agreements with the large food retailing chains call for premium rates of double time for Sunday work, time and a half for any hours worked in excess of forty hours per week and a maximum ratio of part-time to full-time employees in the vicinity of four to one.¹³ However, we received no evidence whether the 20–30% of retail food employees who were not unionized had the same sort of protection in respect of Sundays, and it would appear to be not coincidental that the one major chain which was not unionized has shown the strongest pre-disposition towards Sunday openings. Organized labour, of course, opposes¹⁴ Sunday openings of commercial retail establishments and this opposition is not necessarily just a device to obtain premium rates for Sunday work. Given the choice as to double time for Sunday work or Sunday off, many union leaders appearing at the public hearings said their men would prefer the day off in order to be with their families or to enjoy their various recreational pursuits. This view was concurred in by a labour relations official of one of the large food retailing chains. Also, it is significant that in recent negotiations between the unions and the two largest food chains, the unions demanded a “no Sunday work” provision in their contract, and only on a “second best alternative” basis would they accept premium rates at triple time.

We received no evidence that employees engaged in non-food retailing, even those who are unionized, would be in an economic bargaining position to demand the same protection. Indeed the suggestion was made by several union representatives that these employees

¹²The following are the main unions in the food retailing industry: The Amalgamated Meatcutters; Retail, Wholesale and Department Store Union; Union of Canadian Retail Employees; and the Canadian Brewery Workers Union.

¹³Our researcher had access to the following collective agreements:

Amalgamated Meat Cutters and Butcher Workmen of North America:

Busy “B” Discount Foods Limited, Ontario

Busy “B” Discount Foods Limited, Ontario — Part Time Employees

The Great Atlantic and Pacific Tea Company, Limited

Power Super Markets Limited, Ontario

Steinberg’s Limited (Department Store Division — Regular Employees)

Steinberg’s Limited (Department Store Division — Part Time Employees)

Steinberg’s Limited (Retail & Food Employees)

Retail, Wholesale and Department Store Union:

Dominion Stores Limited (Department Managers and Clerks)

Dominion Stores Limited (Toronto Warehousemen)

Union of Canadian Retail Employees C.L.C.:

Loblaws Groceries Co. Limited

Union of Canadian Retail Employees C.L.C., Warehouse Division:

Loblaws Groceries Co. Limited

¹⁴Brief submitted to us by the Ontario Federation of Labour on February 5, 1970.

would be at the mercy of their employers in terms of Sunday openings, except for the protection provided under *The Employment Standards Act* for hours worked in excess of forty-eight per week (where time and a half rates are required)¹⁵ and under *The One Day's Rest in Seven Act*¹⁶ for hotel and restaurant employees. The dominant viewpoint of labour representatives appearing in the various public hearings across the province was that all stores should be closed on Sundays, but this should not include the "Mom and Pop" type variety stores except the convenience and jug milk stores-which are part of a chain. In fact, many of the labour representatives regarded the convenience and jug milk store chain openings as the thin end of the wedge towards a wide-open Sunday. These men also argued that many retail stores, particularly food stores, could not carry sufficient inventory for both Saturday and Sunday without additional deliveries, possibly requiring some truck drivers and warehousemen to work Sundays.

The peculiar position of the retail employees deserves comment here because an open commercial Sunday would probably extract the highest toll from these people. It has already been shown that less than 10% of this total group are unionized, and this percentage would be even lower if food store employees were not included. While no statistics on the demographics of retail employees were found, discussions with retail employers at the public hearings and elsewhere indicated that a high proportion of retail employees tend to be married, and many are women whose income is auxiliary to the husband's earnings. The retail work force is distinguished by the fact that the people are older, more likely to be female and more heterogeneous than other labour groups. In considering the position of this group, we were disposed to consider the following questions, admitting that they might be equally applied to other employees engaged in industries with a potentially high Sunday work content: (1) How many retail employees would not mind working on Sundays, if they had another day or two off during the week? (2) In view of the low degree of unionization, what proportion of retail employees would receive premium pay for Sunday work? (3) If Sunday operations became widespread in the retail industry, would premium pay tend to be negotiated out of the contracts for those employees who were unionized, on the strength of arguments concerning meeting competition? (4) What kind of pressure (subtle or overt) would be placed upon retail employees who were reluctant to work Sundays? (5) What changes would occur in the family life and recreational habits of employees who chose to work on Sundays?

In some respects, the questions as posed suggest their own answers. In other respects, some limited answers will be provided in a later chapter which reviews Sunday behavioural patterns and social effects in Ontario. But what is clear to us and most relevant to the present discussion is that the economic issues, including the protection of premium rates and one day's rest in seven, are secondary to the sociological issues typified by question (5). Most retail employees, or

¹⁵S.O. 1968, c. 35, ss. 7, 14 (1).

¹⁶R.S.O. 1960, c. 269.

other types of employees for that matter, simply do not want to work on Sundays.

This view was borne out by submissions made to us by the great majority of management and employee groups. Many managers believe they could possibly locate employees willing to work on Sundays on a full-time or part-time basis, but most said they did not think this was desirable. Department store managers in particular were concerned that Sunday openings would lead to an inferior level of service and create difficulties in training adequate staff. They cited the problems of attracting educated and talented personnel to the retailing industry and expressed the view that Sunday operations would add little glamour to retailing for either the floor clerks or their supervisors.

It would be very difficult to estimate the number of employees who would volunteer to work Sundays if premium pay was provided although some managers said they could find clerks if required. Similarly, it is difficult to estimate whether such employees would receive premium pay for Sunday work. Even the non-union retail employees would benefit to a certain degree from the gains made by the unions such as in the food retailing industry. However, this might be offset by a tendency towards the use of low-skilled part-time help, a group having little bargaining power. Certainly, organized labour would never give up an established benefit without receiving some greater benefit, so it is unlikely that premium pay would be negotiated out of existing union contracts or arrangements. Perhaps the major concern here, which again tends to emphasize sociological as opposed to economic issues, is the possibility of subtle pressure being applied to push reluctant employees into accepting regular Sunday work or even occasional Sunday work. The concern, then, is mainly for low-skilled, non-union and poorly educated employees whose continued earnings are critical for family support, people who have the least mobility in terms of job alternatives and are least capable of expressing themselves to redress their grievances. Particularly in times of high unemployment, these people are susceptible to economic coercion and would unlikely be in any position to offer effective resistance to Sunday employment dictated by management, even though they were given a "legal choice" as to whether or not they wanted to work Sundays.

The above discussion relates primarily to a potential situation only. The proportion of retail employees now working on Sundays is very low, and it is only if Ontario were to adopt an open commercial Sunday that the above considerations would come into play.

As for employees engaged in non-retailing service industries who are required to work Sundays, those who are unionized, particularly in transportation and utilities, generally receive premium rates for Sunday work and a guarantee of time off through the week. However, many persons engaged in service industries on Sundays, such as hospitals, parks, race tracks and stadia, do not receive premium rates; Sunday work being an implied term of their employment in that line of work. There are some types of service industry employees who do receive premium rates such as those engaged in transportation and utilities of

course, or motion picture projectionists or certain maintenance personnel, but this is not widespread through all service industries. Again, premium rates for Sunday work depend in many cases on the extent of unionization.

While there was little evidence placed before us in respect of manufacturing industry employees in general, there was considerable evidence with respect to employees in the pulp and paper industry which, for the most part in Ontario, operates on a continuous process basis. The usual practice when a pulp and paper company decides to adopt a seven-day continuous process operation has been, at union insistence, to grant all employees so engaged a 10–15¢ across-the-board pay increase applicable to every hour worked throughout the week, and to pay time and a half, or in some cases double time, for the hours actually worked on Sunday. This has generally proved to be satisfactory to both the companies and the employees since it has permitted not only more efficient production and higher wages for the employees, but has tended to regularize the occasions on which the men would have to work Sundays. A non-continuous operation still requires a great many men to perform maintenance tasks intermittently on Sundays, which often results in as many men actually working Sundays as if the plant were on a seven-day operation.

¹⁷Table VIII. Collective Bargaining Provisions in Ontario Municipal Agreements — January 1970 (Research Branch of the Ontario Department of Labour)

COMPENSATION FOR WORK NOT REGULARLY SCHEDULED ON
SUNDAY OR SEVENTH DAY UNDER ONTARIO MUNICIPAL
AGREEMENTS

Amount of Compensation	Non-Office		Office		Office and Non- Office	
	Agrts.	Empls.	Agrts.	Empls.	Agrts.	Empls.
No provision	27	1,259	10	520	3	139
Time and one-half	22	5,700	7	619	5	178
Double time	53	4,169	11	3,014	11	3,771
Varies for different groups	—	—	—	—	1 ^a	32
Time and one-half off or pay at straight time	—	—	1	24	—	—
Equivalent time off or or pay at time and and one-half	—	—	1	315	—	—
Other	1 ^b	28	—	—	—	—
Total:	103	11,154	30	4,492	21	4,383

a. Double time for some office employees and time and one-half for other office employees and non-office employees.

b. Time and one-half plus 33 cents per hour until April 30, 1970, and time and one-half plus 35 cents per hour after this date.

In any event, it would appear that the example of the "premium rate" position of the employees in the pulp and paper industry in Ontario is the optimum position which any employees engaged in continuous production in the province have been able to negotiate. Similar arrangements undoubtedly prevail in other continuous process manufacturing industries such as steel production and petroleum refining.

Provisions in collective agreements for premium rates for Sunday work in Ontario have been compiled and tabulated by the Research Branch of the Ontario Department of Labour, but only with respect to Ontario municipal agreements, Ontario hospital agreements and Ontario construction industry agreements. Tables VIII¹⁷ and IX¹⁸ set forth the nature and amount of compensation for work not regularly scheduled on Sunday or the seventh day under (1) Ontario municipal agreements (as of January 1970) and (2) Ontario hospital agreements (as of March 1970), respectively. About half of the municipal agreements representing well over half of all unionized municipal employees in Ontario provide for double time, while the remainder seem to be split approximately between time and a half (or some variation thereof) and no premium rate at all (although the latter represents only 10% of the total municipal unionized employees). Unionized hospital employees do not appear to be as well off with over 75% of the agreements representing over 67% of the employees providing no premium rate for Sunday work, and with most of the others, representing 26.2% of hospital employees, providing only for time and a half.

¹⁸ Table IX.

*Negotiated Wages and Working
Conditions in Ontario Hospitals —
March, 1970 (Research Branch of
the Ontario Dept. of Labour)*

COMPENSATION FOR WORK NOT REGULARLY SCHEDULED ON SUNDAY OR SEVENTH DAY
UNDER ONTARIO HOSPITAL AGREEMENTS

AMOUNT OF COMPENSATION	NON-OFFICE		OFFICE		PROFESSIONAL		NON-OFFICE OFFICE & PROFESSIONAL		TOTAL			
	Agrts.	Empls.	Agrts.	Empls.	Agrts.	Empls.	Agrts.	Empls.	AGREEMENTS		EMPLOYEES	
									No.	%	No.	%
No provision.....	143	17,980	6	608	11	996	4	1,681	164	75.9	21,265	67.7
Time and one-half.....	21	3,800	1	115	7	2,386	3	1,950	32	14.8	8,251	26.2
Double time.....	13	574	—	—	—	—	1	170	14	6.5	744	2.4
Equivalent time off or pay at time and one-half.....	1	9	—	—	—	—	—	—	1	0.5	9	a
Time and one-half or pay at straight time.....	1	159	—	—	—	—	—	—	1	0.5	159	0.5
Time and one-half off or pay at time and one-half.....	1	160	1	3	—	—	—	—	2	0.9	163	0.5
Time and one-half or another day off	1	80	—	—	—	—	—	—	1	0.5	80	0.3
Time and one-half plus a day off.	—	—	—	—	—	—	1	755	1	0.5	755	2.4
Total.....	181	22,762	8	726	18	3,382	9	4,556	216	100.0	31,426	100.0

a — Less than 0.5 percent.

Construction workers¹⁹ would appear to have negotiated the best premium rate position for Sunday work. As of March 1970, the almost invariable pattern across the province in every construction union seems to be provision for double time rates for Sunday work. In the Toronto region, for example, there are only two local unions²⁰ who do not have provision for double time rates on Sunday, and these two provide for time and a half. This pattern would appear to be prevalent right across the province. The fact that unionized construction workers have a better Sunday premium rate position than either municipal or hospital workers can probably be explained not only by the higher degree of union membership of construction employees as compared with hospital workers and municipal employees, but also by the fact that the incidence of Sunday work in construction is far less likely than in municipal jobs (e.g., emergency road maintenance) and certainly in hospital work.

In summary, the degree of trade union membership in an industry is an important factor in determining the extent to which the employees in that industry will receive premium rate benefits and full-time/part-time ratio protection in respect of Sunday work. Also, those industries which have a higher degree of Sunday work content are less likely to countenance premium rates and fixed ratios for Sunday work as a matter of course, notwithstanding the degree of trade union membership. If there is a move towards an open commercial Sunday in Ontario, retail employees are the most vulnerable to employer exploitation because of the low degree of union organization, a general lack of job mobility and the resulting potential for employer economic coercion which can force them to accept Sunday work as a matter of course. All these economic factors relating to collective bargaining and conditions of Sunday employment are secondary to the sociological factors to be discussed in the next two chapters.

C. SUNDAY RETAILING: SALES, PRICES AND PROFITS

Understandably, the Sunday retailing issue proved to be one of the most controversial throughout the course of our study and review. In many instances, submissions for or against Sunday retailing were based more on arbitrary speculation than on economic fact. It was often difficult to decipher the extent to which the positions were taken on a religious or sociological as opposed to an economic basis, and it was apparent from the outset that economic conditions varied, depending on the type of retailing that was being discussed. Even where submissions were based on economic considerations alone, it was not always clear whether they related to the whole of a retail sector or merely to the adverse consequences that might be suffered by the individual retailer if changes were to be made.

¹⁹The Research Branch of the Ontario Department of Labour has compiled a two-part detailed summary, as of January 1970, of hours, wages and related payments for all collective agreements in the Ontario Construction Industry (by location, union and occupation).

²⁰Plumbers, Local 46, and Sheet Metal Workers, Local 285.

Hypothetically, there are three major economic positions which can be created or maintained by governmental regulation of Sunday retailing: (1) a more restricted Sunday with only the most basic of necessities permitted to be sold at certain times and according to certain conditions; (2) maintenance of the present position where there is some Sunday retailing permitted (including non-necessity items) if carried on in business establishments which are either exempted from the federal legislation (as judicially defined "works of necessity or mercy") or against which prosecutions are not brought as a matter of provincial government policy; and (3) an open commercial Sunday where retail establishments would be permitted to open or close on Sundays at their discretion. While to a limited extent it is possible to ascertain the economic effect of Sunday observance laws from a consideration of positions (1) and (2) in isolation, the full economic effects cannot be truly ascertained until one attempts to make an assessment of the third position, i.e., a wide-open commercial Sunday for retailing in Ontario. This will permit a comparison of projected sales, prices and profits in a system of open commercial Sundays with those at present. Because the analysis following will concentrate on the implications of the third position does not mean that we are promoting an open commercial Sunday for Ontario. This is merely an analytical device for isolating the economic aspects of the question, quite apart from the sociological, religious and legal aspects.

The removal of any restrictions on Sunday retailing would not necessarily mean that *all* stores would open. This is a false assumption which was made in a number of submissions. While one can assume that retailers would attempt to maximize their own interests in deciding whether to open or not to open, these decisions are not always made on the basis of pure economics alone. Some retailers might prefer to close their stores on Sunday in order to keep their employees happy or to allow themselves a quiet day at home with their family. In short, there is a danger in making a blanket statement without considering such non-economic factors as employee satisfaction and managerial preferences.

Taking economics alone, the decision as to whether or not a *class* of retailers could afford to open their doors on Sunday would depend heavily on four factors: level of service; turnover; gross margin; and the ratio of variable costs to fixed costs. Whether or not a *specific retailer* within a class could afford to open his doors depends on the habits of his customers, the nature of his product line and the location of his store. Perhaps the most available indicator among all these factors is the gross profit ratio (also referred to as the gross margin) for various kinds of retail businesses. Table X shows some typical retail gross profit ratios by kind of business in Ontario for the year 1961.²¹ For example, the average for food is 17.8%, and this incorporates a broad range from 15.0–40.7% covering all types of foods. The gross profit ratios generally are a reflection of the level of service offered and the inventory turnover. For example, the inventory turnover of jewelry is low and the level of service is fairly high. Hence, the gross profit ratio is high. With food, the opposite is true with inventory being high and the level of service being com-

paratively lower. Based on this type of analysis and as a rough generalization, the lower the gross profit ratio, the more likely a class of store would open on Sundays as an economic matter. The main reason for this is that the low service operations could staff Sunday operations more easily. Their "fixed" costs of labour for that day would be relatively low as most employees could be added in as a "variable cost", depending on the extent of customer demands. Carrying the analysis to an even greater depth, it could be shown that a class of store would have a greater propensity to open if it had a low level of service, a high turnover, a low gross margin and a high ratio of variable costs to fixed costs.

While the above type of analysis takes into account *all* economic factors that can bear on the problem, it is much easier to perceive the economic implications of the decision to open on Sunday by looking at the key ingredient — the cost and availability of labour for Sunday work. It hardly needs stating that the extent to which

²¹Table X.

RETAIL GROSS PROFIT RATIOS BY KIND OF BUSINESS, ONTARIO 1961*

Kind of Business		Gross Profit Ratios
TOTAL.....		28.2
Food (average)		17.8
Candy, nut.....	40.7	
Confectionery	20.2	
Fruit and vegetable.....	19.1	
Grocery without meat.....	15.0	
Grocery with meat.....	17.4	
Butcher	20.2	
Fish.....	34.0	
Delicatessen.....	26.9	
General Merchandise		34.0
Department Stores.....	34.2	
General Merchandise	28.0	
General Stores.....	16.9	
Variety.....	37.7	
Automotive		24.3
Apparel and Accessories		34.3
Hardware and Home Furnishings.		33.2
Hardware.....	30.3	
Furniture.....	31.7	
TV Sales and Service.....	37.4	
Household Appliance.....	30.9	
Other		34.3
Drug (without meal)	32.1	
Drug (with meal)	35.1	
Tobacco	20.6	
Gift, novelty, souvenir.....	34.6	
Jewelry.....	42.0	
Florists.....	49.0	

*Source: Dominion Bureau of Statistics.

retail employees are willing to work on Sundays, and the premium rates which they would receive or be in a position to demand would directly affect managerial decisions to open or not to open. As was seen in the previous section, there are variations in the extent of union organization and practices relating to premium rates for Sunday work, depending on the nature of the industry. Food retailing employees, for example, are 70–80% unionized, and most are in a position to demand double time for Sunday work. Discount store employees, on the other hand, would not appear to be as well organized, so the resulting demand and ultimate effect on managerial decisions would not be as great.

Given the situation where a retail manager decides to open on Sundays, and assuming that he does not close his store on any other day of the week to compensate for the increased costs on Sunday, where does he generate the money to pay the increased Sunday opening costs? It can come from four potential sources: (1) by increasing the total week's volume in that store; (2) by increasing prices of the goods sold; (3) by decreasing profits, or (4) by increasing efficiency. If the store opening Sundays is the only store in a classification and so has virtually a monopoly position on that day, undoubtedly the increased costs will more than be covered from (1), but if an unrestrained competitive situation prevails (and assuming equality on factors such as store location and consumer habits), many of the store's competitors would also decide to open, eventually neutralizing the advantage gained through increased Sunday sales. Therefore, unless the class of stores was willing to decrease profits as in (3) (a highly unlikely event), or increase efficiency (4) (it is unreasonable to assume that Sunday openings would motivate increased efficiencies any greater than now exist), the only other source of offsetting the costs of Sunday openings would be to increase prices.

Many retail managers submitted that increased prices would be a natural result of an open commercial Sunday. Analyses conducted by our economic researcher on various retail establishments led to the conclusion that a price increase in retail goods would be an inevitable result of an open commercial Sunday. His estimate of this price increase was in the range 0.5 – 1.5% if every store in a class were to open on Sunday. This estimate was obtained by averaging across several classes of retail stores. In our opinion, the range of price increase would be substantially higher in certain classes of retail stores, based on evidence we received in the briefs and at the public hearings. Of course Sunday shoppers would receive an additional benefit for this price increase, i.e., the convenience of shopping on that day, but it must be remembered that *everyone* purchasing goods on any day of the week within that class of retail store would be affected by the price increase.

As suggested above, the economic implications of an open Sunday would tend to vary by the class of retailer. Therefore it is proposed to examine briefly five such classifications which have different functions and modes of operation and which could be considered as potential Sunday openers.

1. *Food Stores*

Food stores operate on a gross margin ranging from 16.7–20.2% (gross margin is generally regarded as the amount added by the retailer to the wholesale price of goods to cover labour, display, pricing, advertising, profit, etc.). Convenience and jug milk stores have a gross margin which is slightly higher, but since most of them are now open on Sunday in Ontario, they will not be included in the present analysis of food stores, which, for purposes of this discussion, will include mainly the large supermarket chains.

About half the food stores' gross margin (i.e., 8–10%) is necessary for direct labour costs and another 0.5% is necessary for other direct costs such as packaging materials. The remainder of the margin covers fixed costs and profit.

For the purposes of calculating the economic impact of Sunday operation in food stores, fixed costs can be ignored. These costs continue whether or not the business is open, e.g., heat, taxes, refrigeration, air conditioning, electricity, rent, etc. Most food stores operate sixty hours in the week and Sunday openings would probably involve at least an additional six hours at double time pay (remember that double time rates are almost the rule in food retailing where 70–80% of employees are unionized). A full staff would involve an added cost of approximately 16–20% (on a normal week day, labour is approximately half the gross margin or 8–10%). Even with less than full staff, the added labour cost of Sunday opening would amount to approximately a regular day's wage bill in view of the premium rates that would have to be paid. Therefore, assuming that no more food is sold in the total week because all food stores are open on Sundays, then one day's wage bill will be added to the cost of food.

The above analysis can best be illustrated by an example. Assume that a supermarket sells \$4,000 per average day, or \$24,000 over the six-day week. Their wage costs would be approximately half of the gross margin of \$2,400 per week or \$400 per day. Then assume that this store and all food stores in its trading area begin Sunday operations. The store in this example now has \$2,800 in labour costs to cover its same weekly sales of \$24,000. Now the store can attempt to recover these additional labour costs from one of the four sources discussed earlier: (1) increased sales; (2) increased prices; (3) decreased profits; or (4) increased efficiency. If the store was to attempt to increase sales to cover this amount, it would have to sell 400/.20 or \$2,000 more during the week, which, taken with its present \$24,000 weekly sales, would be an increase in sales of 8.3%. Assuming that all stores within the area were open, this would be an impossible feat. The single largest annual per head real dollar increase in Ontario food expenditure since 1961 came in 1969, and this was only an increase of approximately 3%; for most other years between 1961 and 1969 it was somewhat less than 3%.²² Therefore, an instantaneous increase of 8.3% would be totally unrealistic.

²²Trend of D.B.S. Food Group Sales — Ontario. The 3% increase in consumption for 1969 was based on 1961 constant dollars, with population increases discounted. If one were to calculate increase in consumption in current dollars (not taking into account inflation) or discounting population increases, the annual increase in consumption would be considerably higher.

Taking source (3), the store might decrease its profits by 1.6%, but this would be totally unrealistic, given the marginal profit position of most food retailers today. Considering source (4), it is highly unlikely that 1.6% could be absorbed through the introduction of new efficiencies in the already-sophisticated food industry.

Therefore, the only real alternative for the store would be to raise its prices by 1.6%. While a food price rise of this magnitude might not sound like much to the average housewife, it represents in a normal year increases generally experienced over 2½–7 months through inflation. In terms of real dollars, in 1968, \$2,449,883,000 worth of food was purchased in Ontario. An increase of 1.6% in the price of that food would have added on an additional \$7,198,118. If Ontario consumers were asked to shoulder a 1.6% increase in the cost of food, this would represent an increase of almost \$6.00 per person per year, and on a household basis about \$20.00 per year.²³ True, the families who would shop on Sundays would receive value in return for their increased expenditure, but it would be *every consumer* that would be required to pay this price, it being almost a certainty that food stores would not charge different prices on Sundays than they would for other days of the week.

The above example is fairly typical of the large supermarket chains in Ontario. The estimated price increase of 1.6% is actually lower than that predicted by one of the large food chains operating in this province based on their actual labour costs and sales volume.

Of course, the assumptions in any calculation such as the above example are very critical, and it is admitted that there are many variables. Instead of all food stores being open on Sunday in a given area, it may be, because of non-economic factors previously referred to, that in this area only 50% or even 20% of the food stores would open, and this would materially alter the picture. Perhaps some food store operations might be viable without an increase in prices, drawing some of their volume from neighbouring stores which chose to remain closed. How long these neighbouring stores would continue to remain closed while losing a portion of their sales is a matter for some speculation. As a matter of competitive economics, one would have to expect that the neighbouring stores would have to follow suit in the long run, or risk being driven out of business completely.

A further scaling down of the impact of Sunday openings in food stores could occur if one were to concede that several food operations could stretch their current part-time to full-time ratio to the limit (to avoid paying premium rates) and run with skeleton staffs on Sunday. However, as was noted in the previous section on collective bargaining, 70–80% of retail food employees are unionized and have obtained union contracts which guarantee not only double time rates for Sunday work but definite part-time to full-time ratios (generally 4:1). And at least one food retailing union has obtained a

²³In 1968, retail food sales were an estimated \$2,449,883,000 in Ontario. The cost per person and per household was calculated as follows: .016 times 2.5 billion dollars divided by 7 million people or 2 million households.

contract with a large food chain calling for double time rates even for part-time employees. Admittedly, managers in those stores whose employees are not unionized have some extra leeway in this respect and might be able to avoid a price increase by exploiting part-time low-skilled help for their Sunday work. However, in addition to the fact that even these part-time employees might eventually become organized and demand premium rates, there are additional restrictions such as the minimum wage provisions and limitations on the amount of overtime work at regular rates in *The Employment Standards Act*.

What is the level of sales that food stores in an area could expect to obtain on Sundays? This question is impossible to answer in Ontario at the present time because the great majority of food stores remains closed. The only possible measure would be through a province-wide survey of consumer attitudes and practices, matters that will be dealt with in some detail in the next two chapters of this report. For the moment, the best we can do is to note that there are certain food retailing chains with outlets open on Sundays in violation of the law, and that they all appear to be prospering. Sunnybrook Discount Food Markets Limited (seven outlets open Sundays), Dixie Fruit Market Limited (one outlet open Sundays) and Oshawa Wholesale Limited (three of its Food City stores open Sundays) either made submissions or appeared at the public hearings. Also, it has come to our attention that the following food store businesses have one or more stores open on Sunday: Knob Hill Farms (North York), Supersave Markets (Niagara Falls), Niagara Farms Market (Niagara Falls, Port Colborne and Welland), the Red and White Store at Eastway Plaza (Burlington), Clover Farm (Burlington), and Little Z Market (near Stratford). Whether these stores would do as well if all or the majority of food stores in their area were to open on Sundays is not absolutely clear, but it is highly unlikely since they are now undoubtedly riding the crest of a quasi-monopoly position in their location which they would lose.

Experience in the United States in areas where food supermarkets have been generally open on Sundays has shown that Sunday still remains a relatively low-volume day. Table XI²⁴ illustrates that total Sunday volume is in the range of 10–14% of the total week's business, depending on the particular area. In the mid-Atlantic region of the United States (a region which perhaps best approximates conditions in Ontario), the Sunday volume is 11% of the total week's business, meaning that it is the third worst day, next to Mondays and Tuesdays. One would expect similar conditions to prevail in food retailing in Ontario should restrictions on Sunday opening be lifted. The Sunday volume of business could conceivably be lower than 11% of the total week.

Very little data are available from those food supermarkets now open on Sundays concerning the matter of Sunday volume as a portion of the week's total. An official for Sunnybrook Discount Food Markets told us at the public hearings that his five stores then opening Sundays (three in Toronto, one in Oshawa and one in Peterborough) averaged "almost 10% of the total weekly sales". However, represen-

SUPERMARKET
SALES BY DAY OF THE WEEK

Percentage of Total Weekly Sales

	All Regions	New England	Middle Atlantic	East North Central	Southeast	West North Central	West South Central	Pacific	Canada
STORES CLOSED SUNDAYS									
Monday	9	8	8	9	9	10	9	13	4
Tuesday	9	8	9	9	8	9	13	12	7
Wednesday	11	14	11	11	10	10	14	12	10
Thursday	18	21	20	16	16	16	13	16	22
Friday	27	27	28	27	28	26	22	21	32
Saturday	26	22	24	28	29	29	29	26	25
TOTAL	(*2) 100%	100%	100%	100%	100%	100%	100%	100%	100%
STORES OPEN SUNDAYS									
Monday	9	7	8	9	11	8	9	10	
Tuesday	9	8	8	8	9	8	9	10	
Wednesday	10	10	11	10	9	10	13	11	
Thursday	15	19	16	15	13	13	11	14	
Friday	22	22	23	23	21	24	21	19	
Saturday	24	20	23	25	25	27	26	23	
Sunday	11	14	11	10	12	10	11	13	
TOTAL	(*3) 100%	100%	100%	100%	100%	100%	100%	100%	

(*1) Source: "The Supermarket Industry Speaks" — 1969 Annual Report of Supermarket Institute.
(*2) Base: 331 Companies.
(*3) Base: 169 Companies.

tatives of Dixie Fruit Market Limited maintained their store located west of Toronto on Highway 5 did 23% of the total week's business on Sundays. Both of these stores of course are in a quasi-monopoly situation on Sundays, so one would expect Sunday sales to be proportionately higher. It would be difficult to predict what Sunday sales would be in these stores if legal restrictions against Sunday selling were removed, although there is every reason to believe that at least Thursday, Friday and Saturday would each far outstrip Sunday for sales volume.

The public interest and concern over proposals for Sunday food retailing occupied much of our time in the public hearings and on several of the research projects. In addition to some of the above-noted stores which made submissions to us, briefs were received from Dominion Stores Limited, Loblaw Groceries Co. Limited and The Great Atlantic and Pacific Tea Company Limited, all of which opposed Sunday openings for food stores. Also, frequent reference was made to existing food store openings by many of the union, church, consumer and private groups appearing before us. It is because of this public interest and concern, and through a desire to eliminate any misconceptions that might prevail, that we have set forth in such detail the above economic background and analysis.

2. *Discount Stores*

There is a high probability that most discount stores, particularly those located in suburban shopping centres, would find Sunday to be a profitable day. Their self-service format requires few employees. Discount stores operate on a gross margin of about 25%, which is 5-8% above the gross margin obtained by supermarkets. At the same time, the merchandise is more valuable per unit of floor space. These combined facts indicate that discount stores would require a small increase in price such as 0.5 to 1% in order to break even on Sunday operation. A much more likely outcome would be that discount stores would draw an additional 5% in sales away from other retailers such as the independents and department stores.

There were no submissions received from any of the discount stores in Ontario, and the above information was obtained independently by our economic researcher. The two submissions²⁵ from organizations which operate both discount stores and junior department stores did not deal with the questions of sales, price increases and profits of Sunday openings. Also, there was no evidence received of Sunday openings of any discount stores selling general merchandise although it is well known that discount drug stores and gasoline service stations open on Sunday and sometimes carry a range of merchandise not normally found in these types of establishments. There has been evidence of a number of general merchandise discount stores and even department stores opening on statutory holidays in various cities throughout Ontario, and of attempts by municipalities to enact bylaws prohibiting or regulating same. It well might be that these openings are the first step towards Sunday openings should holiday sales prove to be profitable to these operations.

²⁵F. W. Woolworth Co. Limited (includes Woolco Department Stores) and Zeller's Limited (local manager in London, Ontario).

3. *Department Stores*

Many department stores would find it difficult to make Sunday a profitable day. There are two important reasons for this. First, despite a forty per cent gross margin, department stores require a high level of service which would mean almost a complete staff on Sundays. This would tend to complicate employee relations and engender demands for premium rates and part-time/full-time ratios as in food retailing, notwithstanding that there is a low degree of union organization among department store employees. Several of the major department stores have adopted an almost paternalistic relationship with their employees, and management would probably be reluctant to introduce Sunday retailing if that relationship were to be damaged.

The second important reason is that many of the major department stores are located in downtown areas where there is a low volume of traffic on Sundays. While there is a trend among Canadian department stores towards moving to suburban shopping plazas, much of their business is still done in downtown stores.

Many of the above views were borne out by submissions received from a number of department stores throughout Ontario, all of which stated their opposition to Sunday openings. Among those making submissions were Gordon MacKay & Stores Limited, F. W. Woolworth Co. Limited, Associated Stores of Canada, R. A. Beamish Stores Co. Limited, the Yonge-Bloor-Bay Association Inc. (membership includes department stores), the Downtown Windsor Business Association (membership includes department stores), and the Hamilton Downtown Association (membership includes department stores).

Many of these stores were concerned that if they had to open Sunday, the level of their service would decrease and it would be much more difficult to attract capable employees to the retailing industry. Also, a number of department stores thought that Sunday openings would be a sure way to drive more department store business into the discount stores which could operate with skeleton staffs and low service.

While none of the Ontario department stores appearing before us indicated a desire to open on Sundays, recent developments in the United States should be noted. There, some of the larger department store chains, including Sears', Penney's, Montgomery Ward's, Federal Stores and W. T. Grant's, have recently opened a number of their stores on Sundays throughout the country.²⁶ Sears' opened 100 of its 820 stores but did so reluctantly to meet the competition, having failed in its bid to promote legislation to enforce Sunday closings. Penney's position was somewhat similar. Their stores were open only in areas where major competitors had decided to keep their stores open. While it is too early to assess the impact of these new department store policies in the U.S., the following tentative conclusions from the U.S. are clear: (1) department stores operating on Sundays are enjoying an overall sales increase, though specific

²⁶ "Are Sunday Hours Really Profitable?", *Chain Store Age*, April 1970, p. E19.

volume or profitability figures are difficult to obtain and further research and analysis would be required to determine if the trend is actually advantageous; (2) discounters, who used to have Sunday selling all to themselves, are being hurt by the new competition; and (3) all merchants, especially the small retailers for the first time experiencing Sunday openings, are finding it more difficult to staff their stores.²⁷

4. *Automotive Stores and Dealers*

Through the cooperation of a major retailer of automotive parts and accessories, our economic researcher obtained detailed financial information and a management assessment of Sunday openings for this area of retailing. Most automotive stores carry a wide line of general merchandise and sporting goods in addition to automotive parts, accessories and repairs. The stores operate on an average gross margin of 22%, and little better than half of their operating costs can be considered variable. Hence, the break-even point for Sunday operations in this type of retail establishment would be very similar to the case of the hypothetical supermarket discussed in section 1 above. In other words, the additional labour cost for Sunday openings (which would probably involve premium rates), would have to be borne through increased sales, increased prices, decreased profits, or increased efficiency. The most likely situation would be increased prices.

The management of the automotive chain which volunteered the information asserted that they would avoid opening Sundays unless competitive pressures forced them into it. This is significant since this chain is the acknowledged leader or industry pace setter. Management felt that Sunday operation could be profitable in several months of the year. A break-even volume of \$4,000 would be required for Sundays, which is much lower than average weekday sales during the summer. Generally, management of this chain felt that many of their Sunday sales would be "new" sales rather than mere transfers from mid-week, and that these would be made at the expense of competitors who did not open. They also believed there would be an increase in total spending for their type of product, away from other types of products, thus making Sunday operations profitable. In the face of this, management still maintained its position of preferring to close, primarily in the interests of employee and community relations.

Briefs from the Toronto Automobile Dealers Association and the Garage Operators' Association of Ontario opposed Sunday openings of automotive stores and dealers in general, although the latter association favoured Sunday opening for essential public services on a rotational basis. 26% of the Garage Operators' membership sell general merchandise and sporting goods as well as repair motor vehicles, and many of these stay open Sundays. However, almost half of those staying open stated on a questionnaire that they did so only because their competitors were open, and this included a number of service station operators compelled to remain open because their

²⁷ *Ibid.*

oil company supplier landlord required that they be open to counteract other brands opening in the same trading area. Of those members of the Garage Operators' Association operating on Sundays (this group comprised 48% of those answering an Association questionnaire), approximately 25% stated Sunday was a reasonably good sales day, while 29% stated that it was an average sales day.

As for the Toronto Automobile Dealers Association, the Chairman of their Legislative Committee told us:

It would be erroneous to assume that our industry could put in longer hours in selling with the resultant increases in costs or operation and without a compensating growth in the selling prices of our vehicles. An increased complement of employees or overtime for existing employees . . . can only result in the same volume of motor vehicles sold to the same amount of people at higher prices.

There was no direct evidence from the Toronto Automobile Dealers Association or from other groups that automobile dealers were opening on Sundays, although there was indirect evidence received from press and radio reports that certain dealers in Metropolitan Toronto were functioning on Sunday, some actually engaged in sales and others merely showing vehicles to prospective customers.

5. *Services and Institutions Ancillary to Retail Selling*

A careful review by our economic researcher of ancillary services and institutions which might be affected by Sunday retail openings can be summarized as follows:

(a) Food:

There would not likely be Sunday deliveries required for biscuits or breads or cakes, but enlarged Saturday deliveries would be required, probably at premium rates, for truck drivers and warehousemen. Sunday deliveries of dairy products would be unlikely but this would depend on the capacity of each retailer's storage facilities. General food products distributed through wholesalers could be stored, and there would be no significant increases in retailer inventory as Sunday would merely smooth weekend sales. Technological advances in the handling of fresh produce would permit a situation where deliveries could be made on Friday or Saturday, and no additional Sunday deliveries would be required.

The Meat Packers Council of Canada stated in their brief that their Sunday retail hours would affect the delivery schedules of meat packers and that federal meat inspectors working at overtime rates would have to be on duty to supervise any Saturday or Sunday packing operations. Also, they noted that if slaughtering firms went to continuous seven-day operation, livestock marketings (stock yards, truckers, etc.) would also have to extend over the whole week.

(b) Department and Discount Stores:

Additional services on Sunday would have to be supplied in respect of credit card clearances and other consumer credit services offered now throughout the week. With this one exception, no other ancillary services would necessarily have to be provided although the closing of such services as the customer complaint bureau or the returned merchandise office would mean decreased customer service in general. It would be unlikely that Sunday delivery service to customers would be required. Most of the department store and discount retailers contacted by our researcher indicated that they would probably curtail internal customer services on Sundays, and operate at 50–75% of regular staff levels. There were differences of opinion among retail managers as to whether Sunday part-time help could be acquired without premium pay.

D. RECENT TRENDS IN RETAILING AND THEIR FUTURE IMPLICATIONS
FOR SUNDAY

A great proportion of modern retailing in Canada, particularly in food, has adopted the American practice of *self-service*. This merchandising concept began in the midst of the Depression and opened up an entirely new set of retailing possibilities and problems. Prior to this time, a merchant was expected to be familiar with the construction and operation of his wares. Much of this “merchant helper” function was abandoned with self-service retailing. The entire process was hastened by modern packaging and brand names which were promoted by all media, particularly television. Many consumer segments began to move from trust in the merchant to trust in the brand name. At the same time post-war prosperity led to an enormous swell in the middle income group which were often the first to accept the new modes of merchandising.

Self-service merchandising began in food products where the bulk of the product yielded the consumer a significant saving in return for the consumer loading his own shopping cart. Some shoppers actually began to enjoy the process of selecting items and moving them to a check-out area. For the masses this was the beginning of a pleasure component in shopping. Alert retailers were quick to offer non-food items in the same self-service setting. Moreover, they added product lines which had traditionally belonged to some other merchant. Druggists began to sell toys, stationery, hardware and candy, while supermarkets began to sell many hardware items and cosmetic lines. This was the beginning of *scrambled merchandising*.

This had significant implications for Sunday observance legislation because many retailers who ostensibly sold essential items regarded as exceptions (“works of necessity or mercy”) from the prohibitions in the legislation, “scrambled” their essential merchandise with non-essential merchandise, giving the appearance of legality to that which might otherwise have been illegal. Certain examples of scrambled merchandising on Sundays in Ontario were brought to our attention during the public hearings: drugstores with independently-franchised

hardware departments; gasoline service stations with huge general merchandise departments; milk and dairy stores with over 2,000 other general food and non-food items; and restaurants with considerable general merchandise located in the vicinity of the cashier's counter.

Whether these forms of scrambled merchandising are a legitimate response to consumer demands or are merely a means of evading existing Sunday observance legislation and holiday and early closing bylaws is a matter which is not entirely clear. But this trend cannot be ignored if there are to be Sunday observance laws and holiday and early closing bylaws capable of effective enforcement.

Discount houses, in addition to using scrambled merchandising, were self-service retailers who decided to emphasize a low price strategy. In addition to the self-service and wide variety of merchandise, these merchants reduced or eliminated other services such as credit, delivery, store decor, and large selections. This gave them a completely harmonious strategy — few services (but brand names) and low prices. Today, a large segment of consumers has accepted the discount strategy. Another segment of consumers continues to patronize full service stores. Indeed, stores with a mixed strategy (some service but some price emphasis) have cropped up to meet the demands of another group of consumers. This bears on the Sunday question since, as noted previously, stores with a low level of service find it easier to open Sundays as an economic matter.

The trend towards telephone merchandising should also be taken into account. Several of the major department stores in Ontario have reported rapid increases in this type of merchandising,²⁸ combined with the wide distribution of store catalogues. While none of the department stores in Ontario has used this technique on Sundays, several of the large chains in the U.S. which distribute their catalogues on a wide scale have opened their telephone-order boards on Sundays as well as evenings, and, aided by media advertising, Sunday sales have flourished even in states where Sunday closing laws exist.²⁹

Another recent development is the aim of modern developers to turn shopping centres into community centres by building recreation facilities into the shopping complex. It is conceivable that theatres, bowling alleys, swimming pools and meeting rooms will draw a considerable Sunday traffic, and there will be an ancillary demand for Sunday shopping by those persons using these facilities.

One more development peculiar to food retailing, which is very relevant to Sunday observance legislation, is the advent of the con-

²⁸Sales Volume of the Robert Simpson Co. Ltd.—Simpson-Sears Ltd. Telephone Sales Department in 1965 was between \$34 million and \$40 million and the growth rate has approached 20% per annum in recent years. The Telephone Sales Department now produces *more* sales than Simpson's Yorkdale Store. Simpson's in Toronto has 240 telephone stations and an additional 110 auxiliary stations. Eaton's in Toronto has about 150 stations.

²⁹Weiss, "Let Me Put It This Way . . . Never on Sunday?" (March, 1968), 50 STORES, the NRMA Magazine, p. 28.

venience and jug milk store.³⁰ Prior to the mid-1950's, these stores were mostly neighbourhood variety stores (often called "Mom and Pop" stores) run in many instances from the front portion of residential premises by a person who used members of his family as his primary employees. Standards of quality varied from store to store and business was often on a personalized basis, involving the purchase of milk or other essential food items which a customer found himself short of on Sundays or during the evenings. The original concept of the modern convenience and jug milk stores, as part of a corporate chain, evolved in the United States some 20 or 30 years ago, and was first imported into Canada in the late 1950's in Metropolitan Toronto. Unlike the "Mom and Pop" stores, these stores offer even longer hours (e.g., 9 a.m. to 11 p.m.) seven days a week, cleaner facilities, more refrigeration equipment, and a complete (though limited) line of food and non-food items. They use the latest techniques in merchandising: location analysis, inventory control, self-service, and modern layout, display and promotion. These stores have grown in popularity with the changing shopping habits of consumers, mostly related to convenience. Consumers do not want to take the time to go to supermarkets or specialty stores to obtain small items if they can obtain what they want in a few minutes at a well-located convenience store open long hours. These stores have proved to be popular both with persons whose life-style is not conducive to shopping at normal hours and with those members of the labour force (particularly married women) who are required to be employed during normal shopping hours. Prices are generally higher than supermarkets (except for milk and other dairy items), and while there is a complete line of food, there is usually only one brand of each kind. As noted earlier, gross margins in convenience and jug milk stores are slightly higher than in food supermarkets.³¹ The average purchase per customer is in the vicinity of \$1.00, as compared with an average purchase in supermarkets of between \$10 and \$20.

Some of the convenience and jug milk stores in Ontario are company-owned operations, while others are individually-franchised under a salary-expenses-commission arrangement; a lesser number are independently owned. This is in contrast to the traditional variety store which is almost always independently owned. At least 24% of sales in convenience and jug milk stores are made up of milk and other dairy products, and at least another 25% are tobacco products. The balance includes primarily food (groceries 18%, bakery products 9%, soft drinks 7%, candy 4%), and a small proportion of non-food items. In theory, convenience and jug milk stores are supposed to complement rather than compete with food supermarkets although this is a proposition open to some question in areas where

³⁰Information concerning the development and nature of convenience and jug milk stores was obtained from the submissions to us by Mac's Milk Limited and the Becker Milk Company Limited, from information given by jug milk store managers to our behavioural researchers, and from a research paper entitled "Convenience Store Development in the U.S." prepared by Hugh White and Philip Cooper in the Food Marketing Program of the Graduate School of Business at Michigan State University in 1967.

³¹Gross margin estimates at between 23-27% are contained in the White and Cooper paper, *ibid.*, as quoted from a 1965 Survey by Progressive Grocer.

they have captured a significant portion of the food market to the point where the supermarkets regard them as a competitive threat.³² For example, on "split shopping" sales (i.e., those food purchases made *apart* from the week's regular grocery shopping, which average approximately 25% of a housewife's total weekly purchases), the convenience and jug milk stores in Ontario sell far more milk and tobacco than the supermarkets. Taking all items that are available in both types of stores, the convenience and jug milk stores are coming close to capturing as great a portion of the "split shopping" sales as the supermarkets, particularly in Metropolitan Toronto.³³

In recent years, convenience and jug milk stores have extended to many parts of Ontario. The following are some of the convenience and jug milk operations which have come to our attention: The Becker Milk Company Limited (which made submissions to us and which reported 270 outlets in Ontario), Mac's Milk Limited (which made submissions to us and which reported 260 outlets in Ontario), Town and Country Stores (Simcoe), Starlight Stores (Windsor), Jolly Jug Stores (Sudbury), Mike's Milk (Barrie), Avondale Dairy (St. Catharines), Bantam Stores (Burlington), Jac's Milk Stores (Cooksville), Stuarts Stores (Toronto), Shaws Dairy (London), 7-11 Stores (Windsor), Bill & Ray Stores (Kingston), Dixie Dairy Stores (Ottawa), Hodge Podge (Lindsay), Friendly Jug (North Bay), Kwik Shops (St. Catharines), Mark's Milk (Niagara Falls), Stoney Creek Dairy Stores (Hamilton), Little Z Stores (Kitchener), Jug Mart Stores (Cornwall), Good Neighbour Foods Limited (Toronto).

According to the best estimates available to us, it would appear that the convenience and jug milk store chains now account for at least 4½% of all food sales in Ontario, with the two largest chains accounting for at least 4% total food sales by themselves. These percentages would undoubtedly be higher in the Metropolitan Toronto food market where these stores exist in proportionately far greater numbers. Approximately 20% of the total week's sales in the convenience and jug milk stores take place on Sundays, a figure substantiated by the two largest chains. Sunday is significantly their biggest day. Therefore, the competitive impact of these types of store is considerable in view of their Sunday opening advantage. Their present combined total of Sunday sales in Ontario would likely approach \$20,000,000 per year,³⁴ or \$400,000 average per Sunday.

Proposals and alternatives for the regulation of these stores on Sunday will be discussed in Chapter 11. Suffice it to say here that the rapid increase of the convenience and jug milk stores in Ontario represents a return of the consumer from the supermarket to the small pre-1950's stores of the "Mom and Pop" variety, but with distinct differences related to efficiency, hours, and sales technique. Significantly, these stores appear to have adopted the scrambled

³²*Ibid.*, pp. 20-21.

³³Based on statistical information provided by Dominion Stores Limited.

³⁴Calculated as follows:

\$2.5 billion (total food sales) times .04 (share of food sales held by convenience and jug milk stores) times .2 (portion of week's business done on Sundays).

merchandising technique in recent years. While it might not have been the case when these stores first started up in Ontario, there is now little doubt that the emphasis on milk by these stores is an attempt, at least in part, to camouflage side-door Sunday, holiday and evening scrambled retailing (including both food and non-food items) in the face of existing Sunday observance legislation and holiday and early closing bylaws.

A further trend in retailing germane to the Sunday observance question is the notion of horizontal cooperation or inducement. Retailers frequently cooperate through shopping centres or downtown associations to regulate themselves. Such associations have often provided an effective means for regulating store hours, although there have been notable failures as well. Horizontal cooperation has come into play on such matters as joint promotions, local beautification, parking, and traffic flow. It is possible that retailers might be able to deal with Sunday openings at this level, especially where there is a fairly unanimous feeling against Sunday openings. While the actions of local associations would have no legal foundation of course, the social and business pressure to conform to local standards could be considerable. Beyond the level of informal cooperation is the sort of provision appearing in a shopping centre lease which requires a retailing tenant to open or close his store at the will of the landlord. We heard evidence at the public hearings of situations where certain retailing tenants were required to open their premises in the evenings or on statutory holidays when they did not want to because the landlord had required it in the interests of the shopping centre. These tenants feared that a similar requirement might be made in respect of Sunday openings, and there was nothing they could do about it since it was a requirement of their lease agreement. As the size of shopping centres and complexes in both suburban and downtown areas increases, the incidence of this sort of landlord inducement will likely increase.

In summary, recent trends in retailing in Ontario will ultimately lead to Sunday selling in the food supermarkets, discount houses and automotive and accessory stores, *unless these stores are prevented by the law from doing so*. This has been the trend in the United States and there is no reason to believe that it will not occur in Ontario since retailing techniques and consumer demands are similar. This does not mean that all food, discount and automotive stores would begin Sunday retailing. In some instances it would not be profitable because of premium rates required to be paid for Sunday help, and in other instances, it would not be feasible as it would do too much damage to employer-employee relationships.

In the absence of Sunday closing legislation, Sunday shopping would still flourish in Ontario, but not to the same extent as evening shopping has flourished. The final stage of the retail evolution on Sundays in Ontario over the next twenty years without any Sunday closing laws (a stage now being reached in some parts of the United States) would be the operation of a combination of low service stores in suburban shopping centres, including a modern

pharmacy, a five-and-dime, a discount store, and a supermarket. The greatest possible penetration of Sunday openings would be reached when department stores in the major suburban centres (and not in the downtown areas) opened their doors, a phenomenon which also has taken place in some parts of the United States. The Sunday operations of the low service stores located in suburban shopping centres would probably be profitable because they would draw additional sales away from downtown retailers, independent retailers and merchants in smaller outlying towns. This is a phenomenon which is now present in some Ontario centres respecting the other days of the week, the Yorkdale Mall in the northern part of Toronto being the most obvious example. It would never be clear whether these low service stores and department stores in suburban shopping centres which eventually opened on Sunday did so to increase sales or profitability or merely as a defensive measure to meet competition.

What does remain clear about the future of Sunday retailing in Ontario is that it will continue to grow if left to economic self-regulation.

E. THE RELATED QUESTION OF EVENING AND STATUTORY HOLIDAY RETAILING

Two significant studies on the question of evening and statutory holiday shopping hours have been conducted recently in Canada which are relevant to the Sunday retailing question. In 1966, a three-man study committee on the opening and closing hours of Quebec business establishments was organized by the government of Quebec under the chairmanship of Jean-Louis Rameau. Submissions were received from approximately 78 groups, mostly retailers and employee groups, and public hearings were held throughout the province. Being careful not to touch upon the Sunday question, the Committee recommended that the municipalities give up the power to regulate opening and closing hours and that province-wide legislation be enacted designating in each economic region fixed hours in which retailing is allowed, varying slightly from region to region but generally from 8 a.m. to 6 p.m. Monday to Wednesday, 8 a.m. to 10 p.m. on Thursday and Friday, and 8 a.m. to 1 p.m. on Saturday (two of the ten regions would close at 5 p.m. Saturday and one at 6 p.m.), except for the month of December and the week preceding Easter in which case hours would generally be 8 a.m. to 10 p.m. It was also recommended that all retail business be closed on June 24 (St. Jean-Baptiste Day), July 1 (Dominion Day), Thanksgiving Day, and other civic holidays named by proclamation. Some of the reasons given for these recommendations were as follows: (1) the fundamental elements of a sound competition are the quality of the product, the quality of the service and the price; (2) the freedom and real need of the consumer in a competitive situation is not to have access to shopping all the time, but to be informed of the various choices as to product, service and price available so he can be in a position to decide how he wants to allocate his buying power; (3) it would not be good for the industry that all business establishments be opened

every night of the week or very long hours as it is evident that in any given region in a particular period the whole of the business establishments can only sell up to the existing buying power to meet the needs of all the consumers in that region; (4) in a system of fixed hours uniform for all retail businesses, the volume of buying will not fluctuate to any great extent and the public will adapt easily to any change; (5) unrestricted business hours tend to benefit certain enterprises with several branches in their locality since they can more easily mobilize an organization to keep their establishments open long hours every working day through a rotation of personnel; (6) with long business hours, and assuming that employees need a holiday, it is impossible to synchronize the non-working hours; this operates to the prejudice of employers, employees, and consumers who demand a minimum of specialized services; and (7) the sociological aspect of the problem is important and the employees of retail businesses and the merchants themselves have the right to a legitimate rest and to engage in their pastimes much the same as any other citizen.³⁵ Most of the Committee's recommendations were introduced as legislation by the government of Quebec early in 1969, except that hours were not to be fixed on a regional basis but were to be made uniform throughout the province. After considerable debate in the National Assembly,³⁶ this legislation became law in that province as the *Commercial Establishments Business Hours Act*³⁷ on January 1, 1970.

This Act prohibits retailing from commercial establishments throughout the province on January 1, January 2 (before 1 p.m.), the day after Easter, June 24 (or if the 24th is a Sunday then the 25th), July 1 (or if the 1st is a Sunday then July 2), the first Monday in September, the second Monday in October, December 25, December 26 (before 1 p.m.), and any other day fixed by government proclamation. Weekday retailing hours are set throughout the province at 8 a.m.–6 p.m. Monday–Wednesday, 8 a.m.–9 p.m. Thursday and Friday, and 8 a.m.–5 p.m. Saturday. Exempted from these restrictions are establishments whose sole or principal activity is the sale of newspapers or periodicals; tobacco; meals; commodities consumed on the premises; pastries or confectionery; pharmaceutical, hygienic or sanitary products; gasoline, motor oil or fuel oil; automobiles, trailers or boats; agricultural machinery; flowers; and commodities sold from premises operated by a maximum of three employees (including the owner or manager) during the entire day. Fines are provided of up to \$1,000 for owners or managers violating the restrictions, and up to \$100 for employees violating the restrictions.

The other study concerning evening shopping hours was a detailed project to investigate the benefits and costs of evening shopping to the Canadian economy, conducted by Professors Bruce

³⁵Rapport du Comité d'étude sur les heures d'ouverture et de fermeture des établissements commerciaux du Québec (Décembre, 1966), pp. 67–68.

³⁶Débats de l'Assemblée nationale du Québec, 4th Sess., 28th Legislature, 13 February 1969; 5 March 1969; 12 March 1969; 26 March 1969; 16 April 1969; 12 August 1969; 20 August 1969; 7 October 1969; 23 October 1969; 24 October 1969; 21 November 1969; 27 November 1969.

³⁷1969 S.Q. c. 60.

Mallen and Ronald Rotenberg of Sir George Williams University, Montreal, a study commissioned by the National Retailers' Institute.³⁸ Portions of this study were more oriented towards the habits and practices of consumers compared with the 1966 Rameau study which responded primarily to managerial and employee submissions. Professors Mallen and Rotenberg noted several significant changes in working and in geographic living patterns of the Canadian consumer, particularly married women, one-third of whom now work at full-time employment. In fact, 46.6% of all working women were married as of 1961, and the trend towards more married women entering the labour force is, in their view, likely to continue. Professors Mallen and Rotenberg asserted in the summary and conclusions of their study that working women find it most difficult to do their shopping at traditional times between 9 and 6 and would prefer the evenings and weekends for this purpose. Also, they indicated a growing tendency, particularly among young married couples, to do shopping on a family basis, especially when purchasing durable goods such as furniture and appliances. They suggested that the only time the husband and wife can shop together if they are both working would be in the evenings and on the weekends.

Later in their report, Professors Mallen and Rotenberg stated:

Much of the legislation which restricts retail outlets hours of operation may be protecting a small group in the retailing community rather than employees. Restrictive legislation may have been useful at a time when employees were required to work much longer hours. However, at the present time, the forty hour work week is a fact in most retailing establishments and the problem of employee morale appears to be exaggerated. Hours of store operation after six and *on weekends* usually make use of large numbers of part time help. Retailing experts in the States feel that employees and their unions do not object to the stores remaining open during the evening and *longer hours on weekends* so long as the employees are not required to work more than a forty hour week. On the contrary, many employees welcome the opportunity to work more than forty hours a week since they are paid time and a half or double time and have a chance to increase their income.³⁹ [emphasis added]

While not in a position to comment on this statement respecting evening hours and Saturdays, we must disagree with respect to Sunday hours. The evidence submitted to us by retail managers, employees and the trade unions in Ontario (summarized in the next chapter) points to the conclusion that employees *do* object to working Sundays regardless of whether premium rates are paid or not. Herein lies the nub of the distinction between evening hours and Sunday hours. Neither the Rameau Committee nor Professors Mallen and Rotenberg were required by their terms of reference to direct their minds to the Sunday question, so their observations, con-

³⁸ Mallen & Rotenberg, *The Benefits and Costs of Evening Shopping to the Canadian Economy* (April, 1969).

³⁹ *Ibid.*, Vol. I — *The Environment, Situation and Legislation*, pp. 22-23.

clusions and recommendations respecting retailing must be viewed in that light. Retail employees might conceivably be willing to work during the evenings, particularly if they receive premium pay. But we are convinced that the same employees would prefer to have Sunday off because it is the one day that they can be with their families or have a day for recreation on a regular basis. The same would be true for statutory holidays which, in our view, have a much closer affinity with Sunday in the minds of retail employees than do evening hours. And we would not deny that many employees make a distinction between evening hours and Sunday hours on religious grounds.

Finally, U.S. experience has also shown (see Table XI⁴⁰) that Sunday retailing in the food industry has proven to be generally the third worst day in the week, even where the stores are wide-open, while evening hours have generally still been the busiest. In most places where retail stores are open in the United States, ancillary services such as returned merchandise offices, home delivery and customer complaints bureaux are seldom provided, which is another difference from evening shopping hours. Evening hours have never been imbued with the same social traditions as Sunday hours in North American society. Therefore, we would take issue with several U.S. commentators⁴¹ who draw close parallels between the trend to evening shopping hours in the 1940's and 1950's and the present moves by some towards Sunday shopping hours. While the differences may not be quite as great in the United States, they would appear to be deeply rooted among the great majority of the people of Ontario.

But having said this, we are also of the view that many of the reasons for restricting statutory holiday and evening hours put forth by the Rameau Committee in Quebec are equally applicable to Sunday hours.

During the course of our public hearings, repeated references were made to the matter of statutory holiday and week-night shopping hours. The need was expressed, particularly by retailers and union representatives appearing, for legislation (1) prohibiting store openings on statutory holidays on a province-wide basis; and (2) providing for uniform store closing hours on week-nights on a province-wide basis. Many of these persons felt that this lack of uniformity discriminated against the smaller stores and permitted variations in local bylaws from municipality to municipality, giving rise to inequities between stores in adjacent municipalities. And they felt that these two issues were directly related to the question of Sunday retailing.

Following our public hearings it was drawn to our attention on several occasions that the number of department, discount, furniture and food stores opening in various parts of Ontario on Victoria Day, Dominion Day, Civic holiday, Labour Day, and Thanksgiving was

⁴⁰Note 24.

⁴¹See Bowen, "Sunday Shopping: An Innovation Fraught with Dissent" (1967), 49 STORES, the NRMA Magazine, p. 19; also Weiss, "Never on Sunday?", a study on Sunday Retailing commissioned by Doyle Dane Bernbach Inc. of New York in 1962.

increasing at a rapid rate in 1970, particularly in the larger cities. It was contended that this trend was the last step before an open commercial Sunday, and that the government should step in now and stop it because the same social considerations justifying preservation of a Sunday pause day were applicable to statutory holidays. To a lesser extent, concern was expressed about the present widespread trend toward evening openings five or six nights a week until 9.30 or 10.00 p.m. when just a few years ago most stores opened only two nights a week. Again, there was an attempt to relate this trend to the question of Sunday openings.

Both statutory holidays and evening closing hours (between 6.00 p.m. and 5.00 a.m. the next day) are subject to municipal regulation in Ontario under section 379a of *The Municipal Act*.⁴² However, this municipal form of regulation is permissive and not mandatory. The only other legal restriction is that contained in section 14 of *The Employment Standards Act* which requires time and a half rates for all work performed on a "holiday", or in excess of forty-eight hours per week (there are upward variations of this maximum hour requirement in certain industries).⁴³ Therefore, if there are no municipal bylaws prohibiting or confining opening hours on statutory holidays and weekdays, then a retailing employer in Ontario is free to open at any time he chooses provided he complies with the requirements of *The Employment Standards Act*.

⁴²R.S.O. 1960, c. 249; amended by 1961-62, c. 86, s. 43; amended by 1964, c. 68, s. 10; and further amended by 1965, c. 77, s. 28(1) to (3). Section 379a(5a), pertaining to holidays, reads:

379(5a) The council of a city, town or village may by by-law require that all or any class or classes of shops in the municipality shall be closed and remain closed on all or any of the following days:

1. Any holiday as defined in *The Interpretation Act*.
2. Boxing Day.
3. Any day proclaimed by the head of the council of a local municipality as a civic holiday.

The Interpretation Act, R.S.O. 1960, c. 191, s. 30 (1) defines "holiday" as:

10. "holiday" includes Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday or the day fixed by proclamation of the Governor General for the celebration of the birthday of the reigning Sovereign, Victoria Day, Dominion Day, Labour Day, Remembrance Day, and any day appointed by proclamation of the Governor General or the Lieutenant Governor as a public holiday or for a general fast or thanksgiving, and when any holiday, except Remembrance Day, falls on a Sunday, the day next following is in lieu thereof a holiday.

Sections 379a(3) and 379a(4) relating to evening hours read:

379a(3) The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops in the municipality shall be closed and remain closed on each or any day of the week at and during any time or hours between 6 o'clock in the afternoon of any day and 5 o'clock in the forenoon of the next following day.

379a (4) The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops in the municipality shall be closed and remain closed on one particular day of the week during any time or hours between 12:30 o'clock in the afternoon and 5 o'clock in the forenoon of the next following day.

⁴³S.O. 1968, c. 35, s. 14.

Our terms of reference for this project were limited to Sunday laws in all of their aspects. Therefore, we did not think it proper in the circumstances to solicit briefs and oral submissions at the public hearings or to make proposals concerning these other issues. Nevertheless, we are of the view that statutory holiday and evening closing laws are interrelated with Sunday laws. Any proposals, however, will have to await a further study and review specifically directed toward these other questions.

F. CONTINUOUS PROCESS INDUSTRIES

As noted earlier, approximately one out of eight members of the labour force now works regularly on Sunday. A significant portion of these Sunday employees is engaged in continuous process industries. Many manufacturing industries such as primary steel production and petroleum refining require the continuous operation of plant machinery as a matter of technical necessity, and employees are required to operate this machinery 24 hours a day 7 days a week. There was no suggestion in any of the submissions in the briefs or public hearings that those plants operating on a continuous basis as a matter of *technical* necessity should close on Sunday. To suggest otherwise would be to advocate the virtual elimination of these important industrial processes from the Ontario economy.

However, there are other industries in Ontario where continuous process operations are carried on not necessarily as a matter of *technical* necessity but as a matter of *economic* necessity. Operations in the Ontario pulp and paper industry are the most obvious example. Quite apart from the issue of whether all the Sunday operations in pulp and paper mills are in violation of the present federal *Lord's Day Act* (a matter which has not been judicially determined for all purposes⁴⁴),

⁴⁴In *R. v. News Pulp and Paper Co.* (1917), 28 C.C.C. 77, a Quebec provincial judge held that the employment of a limited number of men in a combined pulp and paper mill on a Sunday was a "work of necessity" under section 11 of the federal *Lord's Day Act* since during the part of the season when the water was high it was necessary to keep the water going in the pulp mill to manufacture the pulp supply on its way to the paper mill, otherwise the product would be injured. And in *Lake St. John Power and Paper Co. v. Otis* (1942), 79 C.C.C. 398, the Quebec Court of King's Bench (Crown Side) refused to convict a paper manufacturer where the only work done on Sunday consisted of repairs to the mill, keeping up fires and the manufacture of sufficient pulp to enable the mill to commence manufacturing paper on Monday.

Section 11 provides:

Notwithstanding anything herein contained, any person may on the Lord's Day do any work of necessity or mercy, and for greater certainty, *but not so as to restrict the ordinary meaning of the expression "work of necessity or mercy,"* it is hereby declared that it shall be deemed to include the following classes of work:

- (d) starting or maintaining fires, making repairs to furnaces and repairs in cases of emergency, and doing any other work, when such fires, repairs or work are essential to any industry or industrial process of such a continuous nature that it cannot be stopped without serious injury to such industry, or its product, or to the plant or property used in such process; [emphasis added]

It has never been judicially determined whether the ordinary meaning of the expression 'work of necessity or mercy' includes continuous process operations of *economic* necessity as well as *technical* necessity.

two fundamental questions emerge respecting this and other continuous process industries employing labour on Sundays: (1) should manufacturing industries whose continuous process operations on Sunday are deemed to be matters of *economic* necessity, and not *technical* necessity, be allowed to continue? If the answer is yes, (2) at what point do such continuous operations cease being a matter of economic *necessity* and become merely a matter of economic *advantage*?

A public inquiry commission in 1966 concerning Sunday observance in Quebec pulp and paper mills,⁴⁵ chaired by Richard Alleyn, considered these questions in some detail in the context of that particular industry. Because continuous process operations in the Ontario pulp and paper industry seem to be the only major area brought to our attention which is in need of clarification, and because of the similarity of the industries in Quebec and Ontario and the depth of the industry research conducted by the Quebec public inquiry commission, we considered it useful to reproduce here that portion of the Commission's report (hereinafter referred to as the Alleyn Report) dealing with the questions of technical necessity, economic necessity and economic advantage for the Quebec pulp and paper industry:

It is difficult to establish a technical necessity for Sunday production when it is known that the industry has been operating for a number of years in the Province of Quebec without production being permitted on Sundays, and that, technically speaking, all the manufacturing processes can be interrupted, if need be. But even if, strictly speaking, technical necessity is practically non-existent, it can arise in an industry that must face competition and be profitable under existing conditions. The frequency of interruptions can cause serious disadvantages to such an industry, since the quality and uniformity of the product may be greatly affected. The technical aspect is closely related to the economic aspect.

Since uninterrupted production is the rule and practice in most producing countries there is a tendency for manufacturers of pulp and paper machinery to develop equipment to operate continuously. Moreover, there is an increasing need to recover expensive chemicals and to reduce stream pollution, both of which objectives call for continuity of production. There even is talk of establishing pipelines for the transportation of woodchips. With the modernization of this industry in Quebec, older machines will be modified or replaced (sic) by newer equipment. Then continuous operation will tend to become a technical necessity. . . .

To establish a valid distinction between economic advantage and economic necessity, as required by our terms of reference, we received great assistance from the special studies provided by

⁴⁵Report of the Public Inquiry Commission Concerning Sunday Observance in Quebec Pulp and Paper Mills (Members: Richard Alleyn, J.D., Jean-Paul Geoffroy, Robert M. Fowler) (1966).

several economists and from the detailed study by P. S. Ross & Associates. In this chapter, we will seek to summarize these economic studies.

In economic science, there is no clear definition of economic necessity, nor any clear distinction between economic necessity and economic advantage. The word "necessity" can obviously be given a strict or a broad meaning in relation to the objective or the goal sought to be attained. Necessity in the strict sense that the objective cannot be attained in any other way is very difficult to establish. In the broad sense, economic necessity exists when the objective is a primary one and when the measure under consideration greatly facilitates the attainment of that objective. When the objective is secondary or when the measure is advantageous but not sufficiently so to be a necessity even in the broad sense, it is a case of economic advantage. . . .

THE ECONOMICS OF LARGE-SCALE PRODUCTION AND THE LAW OF DIMINISHING RETURNS

Our economic consultants gave us valuable comments on the economies of large-scale production in the pulp and paper industry. They point out that, in this context, it is difficult to distinguish between economic and technical aspects which are inter-related. As the scale of production becomes larger, it becomes economically desirable and possible to mechanize operations and, in the result, a technical advantage is created over another mill producing on a smaller scale. Alternatively, the more the processes are mechanized, the greater the investment required and the greater the need to achieve the optimum use of machinery.

Pulp and paper production has long been a capital intensive industry and, in recent years, there has been a marked tendency towards increasing capital costs. With larger and more expensive machines, a mill can achieve economies through specialization of production, through purchase of raw materials in larger volume, through the distribution of administrative costs over a greater quantity of product and in various other ways. At the same time, the higher the capital cost of machinery, the greater the penalty caused by periods when it is not producing. The reduction in unit costs from the installation of large and expensive machines is an economic advantage which can be achieved in no other way; but these costly machines must absorb capital costs for all seven days a week and their use for only six days a week becomes, from an economic standpoint, increasingly difficult to justify. A further collateral factor is the increasing concern about water and air pollution which will necessitate large investments to reduce pollution by processes which more and more require continuous production.

Our consultants point out that there are two economic theories applicable to our problem, which may, at first sight, seem to be contradictory. One is the theory of economies from

large scale production, under which mass production produces economies that increase in relation to volume. The other is the law of diminishing returns where a point is reached in the productive process when an increase in volume results in added rather than reduced unit costs. The economies of large scale production are realised up to a certain point and then the law of diminishing returns begins to apply.

The point at which the law of diminishing returns comes into play varies from one industry to another. On the basis of an extensive study of the pulp and paper industry, our economic consultants concluded that when a mill achieves a rate of operation of 90% of production on a six day per week basis, the economies of large scale production come to an end and the law of diminishing returns begins to operate. They advise that, at this point, it becomes necessary to increase the volume of production, by continuous operation seven days a week, and by the construction of new capacity, in order to maintain unit profits. When a producer reaches an operating rate of approximately 90% of existing six day capacity, it is necessary for him to think seriously of developing additional capacity, and pending the planning and construction of such additional capacity to operate his mill continuously to meet the fluctuating demands of his customers.

Our consultants state that there are many factors which influence the decision to invest in new productive capacity, but profitability is an important factor affecting both the decision to invest and the location of new facilities.

In the pulp and paper industry, the first consideration affecting the decision to invest in new facilities is the demand for the product. When a company can foresee a continuing demand for more of its products than it can presently produce it will contemplate an expansion of its capacity. The decision as to where the expansion will be undertaken depends largely on the comparative profitability of one location over another. The profitability in a particular location depends on many factors, including the costs and quality of raw materials, the costs of distribution of the finished product in serving the contemplated markets, taxes and tax concessions accorded to the enterprise, labour and other production costs as well as many other factors.

Because of the size and nature of capital investment required in the pulp and paper industry, the capital cost per unit of production is an important determinant of an investment decision. To illustrate the influence of continuous production on investment decisions, our consultants gave an example of a pulp and paper mill with a daily capacity of 600 tons, requiring an investment of \$60 millions, and an assumed price for the product of \$140. per ton, providing a daily revenue of \$84,000. If such a mill operates seven days a week, it will produce during 340 days per year, a total of 204,000 tons yielding a revenue of \$28,560,000.

If it operates on a six-day basis it will produce during 308 days per year, a total of 184,800 tons yielding a revenue of \$25,872,000. In both cases, the capital investment of \$60 million is constant.

The effect of continuous production is to reduce the unit cost of capital and to increase the profitability of the investment. Our consultants concluded that if demand will support continuous operation of the mill and if Sunday production is permitted when such demand exists, it will definitely have a favourable effect on new investments in the province. . . .

THE COST OF SUNDAY WORK

Our economic consultants made a detailed survey of the costs of Sunday Work and concluded as follows:

- for the whole industry, the unit cost of interrupted production is 103.19% of the unit cost of continuous production,
- the unit cost of interrupted production of newsprint is 103.2% of the unit cost of continuous production,
- the unit cost of other papers and board on an interrupted basis is 103.38% of the unit cost of continuous production,
- the unit cost of pulps on an interrupted basis is 103.14% of that of continuous production.

NUMBERS OF WORKERS ON SUNDAY PRODUCTION

The issue before the Commission was not a choice between work on Sunday and no work on Sunday in Quebec's pulp and paper mills. There is considerable work now done on Sundays throughout the industry, mainly for repairs and maintenance. The issue facing us concerned the choice between Sunday production and no Sunday production.

Our consultants reported on the effects of moving from 6 day to 7 day production on the number of Sunday workers and the hours they would work. The results of their studies showed that currently about 7,000 employees now work on Sunday in the pulp and paper mills of Quebec and they average 7.1 hours of work each Sunday. If Sunday production occurred throughout the industry, there would be about 11,000 employees, working an average of 8 hours each Sunday. In addition, the number of employees on week-days would increase by about 400 which is 2% of the present week-day employment, by reason of additional repairs and maintenance that would be done during the week, but the average hours worked on week-days would remain at 7.9 hours. The consultants estimate that, if all mills produced continuously, it would create about 2,500 new jobs in the present industry. Furthermore if it encouraged new mills to build in Quebec each new large mill would provide 500 new jobs in these mills. Thus, if 10 new mills were erected in Quebec over the next few years, to utilize more fully the forest resources of the

province, they would provide employment for 5,000 new employees and, on this assumption, the total employment effect of continuous employment in the expanded industry would be 7,500 new jobs in the mills, as well as substantial increases in the woods and in allied industries.⁴⁶

The economic consultants to the Alleyn Commission went on to recommend that, barring very serious sociological disadvantages, Sunday production should be allowed in Quebec's pulp and paper industry.

Eight out of the twenty⁴⁷ pulp and paper companies operating in Ontario submitted briefs to us requesting generally that Sunday production be permitted in their industry. Most of their briefs went to great lengths to explain the economic position of the industry in this province so as to permit the same type of analysis as carried out by the Alleyn Commission above. The following is a summary of the Ontario pulp and paper industry's position.⁴⁸

Ontario has 165,000 square miles of forest, which is approximately 17% of the productive forest land in Canada. Over 9% of *all* Ontario exports are forest products. Close to 80% of the Canadian forest products exports go to the United States, with 10% going to the United Kingdom and the balance to other countries throughout the world. Newsprint accounts for 63% of total exports, and pulps for 33%, while other papers and boards make up the balance of 4%. As of 1967, out of 136 pulp and paper mills in Canada 35 were in Ontario and these employed 21,264 persons (exclusive of logging operations) with salaries and wages amounting to \$144,334,000. Among the Canadian provinces, Ontario ranks second only to Quebec in production of newsprint, third behind Quebec and British Columbia in production of pulp, and second to Quebec in production of other papers and paper boards.

Despite its prominence in the economy of the province, the pulp and paper industry suffers from a number of competitive disadvan-

⁴⁶ *Ibid.*, pp. 102-103; 127; 129-131; 134-135.

⁴⁷ The following companies submitted briefs: The E. B. Eddy Company Limited (Ottawa), Domtar Limited (Ottawa), Abitibi Paper Company Limited (Sault Ste. Marie), The Ontario Paper Company Limited (Hamilton), Dryden Paper Company, Ltd. (Toronto), Ontario-Minnesota Pulp and Paper Company Limited (Toronto), Kimberly-Clark of Canada Limited (together with Kimberly-Clark Pulp and Paper Company Limited and Spruce Falls Power and Paper Company), and The Great Lakes Paper Company Limited. (The cities in brackets are the places where oral submissions were made to us.) The other twelve companies operating in Ontario are: Acme Paper Products, Incorporated, American Can Company, Beaver Wood Fiber Company Ltd., Canadian International Paper Company, Garden City Paper Mills Company, Ltd. and Dominion Cellulose Ltd., Canadian Johns-Manville Company, Ltd., Continental Can Company of Canada Ltd., Diamond National of Canada Ltd., IKO Industries Ltd., The Miller Bros. Co. (1962) Limited, Sonoco Products Company of Canada, Ltd., Strathcona Paper Company Ltd., Thorold Pulp Company, Ltd.

⁴⁸ Much of the economic data concerning the Ontario pulp and paper industry are taken from the briefs submitted by the Abitibi Paper Company Ltd. and the Ontario-Minnesota Pulp and Paper Company Limited. Primary sources were indicated in these briefs (mostly D.B.S., Dept. of Trade and Development and pulp and paper trade journal sources) but have not been repeated here for purposes of simplicity and brevity.

tages in comparison with the more recently developed pulp and paper industry in western Canada and the southern United States. As a result, it has failed in recent years to keep pace with the growth of the industry elsewhere. The most important disadvantages are: (1) high wood costs; (2) slower maturing of pulp wood species; (3) lesser density of pulp wood species per acre; (4) lower fibre yield per unit of wood; (5) higher cost of hauling logs to mills; (6) less modern plants and equipment; (7) higher fuel and power costs; (8) higher inventory costs; (9) higher construction costs; (10) greater distance from markets. Many of these disadvantages, of course, flow directly from the geographic location of Ontario's mills and from the climatic conditions which prevail in those areas, about which nothing can be done.

Canada's growth rate in the pulp and paper industry is lower than its other major world competitors in the U.S.A. and Scandinavia; Ontario has the lowest growth rate of any Canadian province. This applies to most of the major products of the industry: pulp, paper and paperboard, pulp wood and wood residue, and newsprint.

Continuous operation of pulp and paper mills is the general rule in the United States and Scandinavia and in the other provinces of Canada. The Alayn Commission in Quebec recommended continuous production when all the mills of a pulp or paper company there in a product category were employing 90% of their normal six-day capacity, in which case Sunday production would be permitted so long as the condition continued and provided the employees consented and the public authority did not oppose. This recommendation was implemented by order in council in that province in 1966.⁴⁹ Ontario remains as the only province where some mills through union opposition, fear of prosecution under the *Lord's Day Act*, or economic decision are shut down on Sundays, except of course for those mills in Quebec which do not meet the "90% of capacity" requirement. In view of the numerous other disadvantages of the Ontario industry above, compulsory Sunday shut-downs would add an additional 14-15% drop in production due to the lost day. In addition to this, there would be decreases in quality due to the start-up period of Mondays during which inferior production occurs until the machines are turning smoothly. Finally, there would be a risk of increased pollution through extra waste on start-ups and shut-downs. Much of the new equipment designed to reduce pollution runs on a continuous operation basis.

The Abitibi Paper Company Limited listed the following economic advantages of continuous operation for the Ontario pulp and paper industry: (1) increase in production at no capital cost; (2) increase in revenue from one machine; (3) increase in jobs; (4) decrease in hydro and natural gas expenditures; (5) better recovery of chemicals from waste flows; (6) savings in shut-down and start-up costs; (7) increased tax revenues for the federal and provincial governments through increased income, sales and stumpage.

⁴⁹Order-in-Council No. 706, April 19, 1966.

Labour relations in the pulp and paper industry were discussed earlier. Generally, when a company decides to go on continuous operation, the union is able to negotiate a 10–15¢ per hour across-the-board increase together with a premium rate of time and a half for Sunday work. Virtually all the Ontario pulp and paper companies making submissions to us maintained that in terms of the actual number of employees working Sundays, very few more would be working Sundays under continuous operation than would be working Sundays under a six-day operation. A great many maintenance employees would be required under the six-day operation to work on Sunday since maintenance work is most conveniently done when the mill is shut down, whereas the maintenance work would be spread throughout the week on the seven-day operation since there would be no advantage in doing it on Sundays. Taking all three shifts on a Sunday under a seven-day operation, there would probably be more employees in the plant than there would be with a six-day operation Sunday maintenance crew, but usually the six-day operation Sunday maintenance crew would exceed the size of one shift on a Sunday under a seven-day operation. The big advantage of the seven-day operation to maintenance employees would be that they could generally count on having Sundays off. Production employees would still only work less than two-thirds of the Sundays throughout the year (on a staggered pause day basis) and would not always work the same shift on those Sundays when they worked. A production employee would have to work the Sunday daytime shift probably less than one-quarter of the Sundays in a year.

In summary, the pulp and paper industry is a very important segment of the Ontario economy. The cities and towns where the thirty-five-odd mills are located depend very heavily on this industry for their very existence. Since a great portion of the products of these mills is destined for export, the world market implications must be considered. It would appear at this juncture that the Ontario industry is not faring as well competitively as it might, and that its growth rate as compared with Quebec and British Columbia (the two other big pulp and paper provinces) is considerably less. Any decision to close down compulsorily Ontario pulp and paper mills on Sundays would further add to the competitive difficulties of this important industry, particularly in view of the fact that practically all other competing foreign jurisdictions⁵⁰ now permit Sunday production.

⁵⁰The Allyn Report (1966), pp. 103–105, contained the following summary of legislation in other countries where pulp and paper mills are established:

In Great Britain, a committee was formed in 1961 for the purpose of studying Sunday legislation in England and Wales. This committee's mandate, and its December 1964 report indicate that the industrial labour which concerns this Commission was not a part of the study. However, evidence received during the Commission's public hearings stated that there was no law prohibiting continuous production in pulp and paper mills and that Sunday production was a fact.

In most of the United States, there are laws restricting Sunday activities in one way or another (Sunday Blue Laws). However, it seems that there is no legislation specifically concerning industrial labour, and no law prohibiting such production. In the states where pulp and paper mills exist, Sunday production is not regarded as illegal.

A 1964 Finnish law permits Sunday production, and all the mills have continuous production except on some special holiday.

There remains the final economic question as to the extent to which ancillary operations of the pulp and paper industry (or any manufacturing industry purporting to engage in seven-day continuous operations for that matter) can be brought within the scope of economic *necessity*, as opposed to economic *advantage*. For example, Domtar Limited told us that it conducted seven-day operations in several divisions of its chemical and construction materials operations, including chemical developments, lime, salt, tar and clay. The justification given was both *technical* (the long start-up and shut-down period required) and *economic* (the high capital cost required to install additional equipment to meet increased demand at the peak periods of the year). Similar submissions were made with respect to the company's wood preserving, corrugated products and carton specialties divisions based on *economic* and not *technical* reasons.

We will set forth alternatives and proposals in the area of continuous process industries in general in Chapter 14. Suffice it to say here that it is very difficult to determine at what point technical necessity merges with economic necessity, and economic necessity with economic advantage. They are interrelated, as the Alleyn Commission report has already noted above, and it becomes a matter of case by case judgment within the bounds of broad guidelines given to manufacturing and processing industries of this sort.

Labour laws in France forbid the employment of a worker more than six days a week. The weekly rest must have a minimum duration of 24 consecutive hours, and must be granted on Sunday. However, some derogations to this Sunday rule are provided in the case of certain factories adopting the system of rest by rotation granted on different days of the week. This derogation applies under a decree of August 14, 1907 to pulp and paper mills, paper and cardboard factories and industries with processes of a continuous nature. As a rule, paper mills operate on Sundays for technical and economic reasons.

The Netherlands government now authorizes uninterrupted production and the manufacturers recently came to an agreement with their employees which provides for it.

A 1934 Italian law on weekly rest foresees an exception where public utility, technical needs and seasonal work are concerned. The pulp and paper industry is considered as one of those for which rest by rotation is permitted. The permit authorizing Sunday work in Italian pulp and paper mills was granted in 1958.

In Norway the statute limits working hours but provides that "if it is particularly desirable for the public or general interest or other important reasons, the Department can authorize Sunday and Holiday work if the circumstances demand it". Consequently, the pulp and paper mills which do not meet the general conditions allowing Sunday work have obtained special permission granted by the Labour Inspection Council.

In Sweden, there is no law prohibiting Sunday work; however, there is a law stating that a weekly rest of 24 consecutive hours must be granted, preferably on Sunday. As this is impossible in an industry with continuous operation, the law allows Sunday work and an exemption to this holiday stipulation can even be obtained.

There has been continuous production in Australia and New Zealand for several years.

CHAPTER 6

ATTITUDES AND OPINIONS EXPRESSED IN THE BRIEFS, PUBLIC HEARINGS AND INDEPENDENT SURVEYS

S U M M A R Y

- A. STORES AND OTHER BUSINESS ESTABLISHMENTS
- B. RECREATIONAL, ENTERTAINMENT AND CULTURAL FACILITIES
- C. SUNDAY EMPLOYMENT
- D. LOCAL OPTION
- E. THE ATTORNEY GENERAL'S PROSECUTORY DISCRETION UNDER SECTION 16 OF THE FEDERAL LORD'S DAY ACT

The opinions and information put forward in the briefs and at the public hearings proved to be of great assistance, not only in providing samples of the views of many people in this province concerning Sunday observance legislation, but in bringing to our attention certain problems involved in the administration of these laws. Also, a fair portion of the background data appearing in both the previous and subsequent chapters of this report was obtained from the briefs or through further oral submissions and responses to questions at the public hearings. We are grateful to those many persons who provided assistance in this manner.

To supplement the opinions and information obtained through the briefs and hearings, we retained the Social Survey Research Centre, a subsidiary of Canadian Facts Company Limited, to undertake a province-wide survey of public attitudes of Ontario's adult population (18 years and over) toward Sunday observance legislation as it relates to specific types of businesses and facilities. The survey consisted of 502 personal in-home interviews conducted in a number of Ontario communities, with respondents selected according to established modified-probability sampling techniques. Established weighting procedures were employed to bring the total sample of 502 persons into line with Dominion Bureau of Statistics census data. All the interviews were conducted between March 16 and April 10, 1970. Neither the names of the Ontario Law Reform Commission nor the government of Ontario were disclosed to any of the respondents by the interviewers in the employ of the Social Survey Research Centre.

This type of attitudinal research was considered necessary not only to provide information additional to that presented in the briefs and public hearings, but to serve as a check on the representativeness of the opinions and information submitted in the briefs and public hearings. In organizing the project at its initial stages, we were concerned that the persons who might come forward at public hearings on an issue

of this nature might not be representative of the population at large, particularly when the hearings were planned for weekdays during working hours and were not going to be held in every city in the province. Also, we recognized that there might be a reluctance on the part of some people to come forward in this type of forum.

A number of groups submitting briefs and making oral submissions also undertook attitudinal surveys relating to specific types of businesses and facilities on Sundays throughout various parts of the province, quite independently of the study conducted by the Social Survey Research Centre. The results of these other surveys were made available to us, and in most cases made possible useful comparisons between certain regions of the province or in respect of certain types of businesses. We were impressed with the extensiveness of many of these independent surveys, particularly because they gave so many people in Ontario a meaningful way to express their opinion on this important matter.

Before dealing with specific matters, we should state here one *general* impression that was conveyed to us in the briefs and at the public hearings. There did not appear to be any widespread demand for wholesale changes in existing Sunday observance legislation by the great majority of the persons who made submissions on the subject. While many persons recommended the secularization of the laws or the removal of the archaic language particularly in the federal legislation, or suggested that certain provisions (such as those relating to travel or the sale of essential items, or the operation of certain recreational or entertainment facilities) be updated and revised to reflect current practices among Ontarians, very few recommended the complete legal abolition of Sunday as a special day through the wholesale adoption of a "staggered pause day" system or the adoption of another day of the week as a special day common to all persons. Also, the public response to our study and review of this subject, while substantial and certainly useful in the performance of our duty, was not of the intensity which has characterized public interest and concern on some other major problems which have faced governments in Canada in recent years. If public concern and alarm showed itself over the problems of Sunday observance legislation (and these occasions were rare throughout the course of our public hearings), it was generally on the part of those persons opposing any change.

A. STORES AND OTHER BUSINESS ESTABLISHMENTS

The most striking feature of the great majority of briefs and oral submissions was the opposition to a wide-open commercial Sunday in Ontario. Most of the persons making these submissions were willing to concede that certain necessity items such as drugs, bread, milk and gasoline should be permitted to be sold on Sundays, but otherwise the message from virtually all retailing groups, business men's associations, trade associations, church groups, women's groups, and the preponderance of consumers and private individuals was that there should be no extension or expansion of Sunday shopping in this province. Indeed, many groups

and persons submitting briefs and making oral submissions would prefer to see Sunday shopping more restricted than it already is.

The reasons given most often for opposing any extension or expansion of Sunday shopping in Ontario were expressed in many forms, but can generally be pared down to the following two: (1) in order to preserve Sunday as a uniform day free from work to permit rest, leisure, recreation and family activities; (2) in order to protect Sunday as the primary day for religious observance. Some persons, particularly those among the church groups, maintained that these two reasons were interrelated, while others claimed that their opposition to a wide-open commercial Sunday was based not on religion but for secular reasons related to the psychological or physiological well-being of the individual or the maintenance of the family unit.

Those favouring a wide-open commercial Sunday, or at least the removal of any restrictions to let the market provide its own control, were few in number. Only seven of the 154 briefs submitted advocated the removal of *all* restrictions against Sunday selling on the provision of a staggered pause day to be determined by market forces and individual decision.¹ There were others, of course, who either requested that their store or business establishment be exempted from any general prohibition for reasons peculiar to their industry,² or who claimed that the existing prohibition imposed on them a competitive disadvantage since others selling essentially the same type of merchandise were permitted to open.³ Some of the large food retailers⁴ feared they might be forced into Sunday openings if their competitors were allowed to open, although they were very much opposed to this. But apart from the seven submissions referred to and the particular exemptions claimed, there did not appear to be any demand in the briefs and public hearings for an extension or expansion of Sunday shopping in Ontario.

The province-wide survey conducted by our attitudinal researchers indicated the same sort of opposition among the large majority of Ontario residents, although the opposition was not quite as pronounced as in the briefs and public hearings. The following table indicates the percentage of responses on the survey in respect of 28 different categories of stores or business establishments which might conceivably wish to open on Sunday:

¹Professor James Rendall (No. 6), Mr. E. D. McGugan, General Manager of the Western Fair Association (No. 38), Robert C. Norris (No. 76), Radicals for Capitalism (No. 88), Dixie Fruit Market Limited (No. 105), Alan Wheable (No. 107) and Sunnybrook Discount Food Markets (no brief).

²The Becker Milk Company Limited (No. 31), Ontario Motor Coach Association (No. 59), Mac's Milk Limited (No. 64), Garage Operators' Association of Ontario Inc. (No. 99), Laura Secord Candy Shops Limited (No. 103), H. C. Downham Nurseries Limited (No. 116), Greater Niagara Chamber of Commerce (No. 119), Ontario Council of the National House Builders' Association (No. 132), and Urban Development Institute (No. 149). One would also include here the eight pulp and paper companies presenting briefs (referred to in footnote 39 of the previous chapter) which requested the right to engage in continuous seven-day production in that industry as a matter of economic necessity.

³Oshawa Wholesale Limited (No. 71).

⁴Dominion Stores (No. 114) and The Great Atlantic and Pacific Tea Company, Limited (No. 135).

		Percent Of Ontario Residents Aged 18 And Over			
		Proportion Of Business Establishments In Each Category That Should Be Allowed To Stay Open On Sunday			
<u>BUSINESS CATEGORIES</u>		<u>All</u>	<u>Some</u>	<u>None</u>	<u>Don't Know</u>
Restaurants.....	%	65	29	4	2
Gasoline Service Stations.....	%	46	46	6	2
Jug Milk Stores.....	%	50	29	20	1
Laundromats.....	%	47	26	25	2
Small Individually-Owned Variety Stores	%	34	33	31	2
Small Individually-Owned Grocery Stores	%	31	35	31	3
Tobacco Stores And Newsstands	%	31	34	33	2
Car wash Establishments.....	%	33	25	41	1
Flower Shops, Greenhouses, Nurseries....	%	21	31	47	1
Bakeries, Delicatessens, Confectioneries..	%	21	25	52	2
Laundry And Dry Cleaning Establishments	%	19	19	60	2
Book Stores.....	%	16	21	61	2
Music And Record Stores.....	%	15	13	68	4
Large Food Supermarkets.....	%	14	11	73	2
Boutique And Specialty Stores.....	%	13	15	69	3
Automobile, Trailer And Boat Dealers....	%	12	19	68	1
Large Discount Stores.....	%	12	11	75	2
General Merchandise Stores.....	%	12	10	77	1
Department Stores.....	%	12	9	76	3
Sporting Goods Stores.....	%	11	11	76	2
Real Estate, Apartment Sales And Rentals	%	11	10	76	3
Butcher Stores.....	%	10	11	77	2
Clothing And Shoe Stores.....	%	10	9	77	4
Children's Clothing And Toy Stores.....	%	9	11	78	2
Hairdressers And Barber Shops.....	%	9	11	78	2
Banks And Trust Companies.....	%	8	11	79	2
Seed And Feed Mills.....	%	8	9	79	4
Furniture And Appliance Stores.....	%	8	7	81	4

At least 60% of the respondents were opposed to Sunday openings for 18 of the 28 stores or business establishments (including large food supermarkets, large discount stores and department stores). The other eight categories, in varying degrees, provide exceptions to this general opposition. For example, virtually everyone (over 90% of respondents) felt that at least some restaurants and gasoline stations should be allowed to remain open on Sundays. In fact, close to two-thirds (65%) felt that all restaurants should be allowed to stay open, while about half (46%) felt that all gasoline stations should be allowed to stay open.

Jug milk stores and laundromats also enjoyed substantial support for Sunday openings. For each of them, about half of the respondents preferred to see them all open, while another quarter were in favour of having at least some open. To a lesser degree, support was evident for individually-owned variety stores, small individually-owned grocery stores, tobacco stores and newsstands, and car wash establishments. Finally, opinion was split 50/50 on the question of flower shops, greenhouses, nurseries; and bakeries, delicatessens and confectioneries.

In a supplementary survey conducted by our attitudinal researchers, it was found that drugstores rated as high as gasoline stations and restaurants, i.e., virtually everyone was in favour of at least some drugstores being open, and close to half (46%) were in favour of them all being open. But the same respondents, in reply to a question concerning large drugstores which in addition to regular drugstore items also sell other things such as hardware, paints, etc., being open, reacted less favourably; only about one quarter of them (28%) would be in favour of permitting them to open on Sundays.

Our attitudinal researchers attempted to ascertain the characteristics of those people opposing store openings among the Ontario-wide survey group. They found the opposition more prevalent among the following groups of persons: older people; females; the upper socioeconomic level; the frequent church attenders; the non-working (primarily housewives); the less educated; and those living in smaller communities. Surprisingly, union members among the survey group tended to be slightly less opposed to Sunday retail openings than the remainder of the population. Those inclined to favour store openings tended to be among the following groups: younger people; males; non-church attenders; those with higher education; and those living in large cities.

The 502 respondents in the Ontario-wide survey were asked a supplementary question in respect of those stores and business establishments which they rated in the "some open" category, relating to the method for determining which particular establishments within the category would open on a particular Sunday. A bare majority (55%) replied that an impartial rotation system was the best method, while a substantial minority (24%) felt that the determination should be made on the basis of location, and an even smaller minority replied "on the basis of the time of year".

A final question in this area investigated by our attitudinal researchers concerned opinion in Ontario respecting publication of Sunday newspapers for home delivery. Public opinion appeared to be split on this issue, but a slim, definite majority (54%) appeared to be opposed to Sunday newspapers.

The above survey results were largely borne out by independent surveys taken in various parts of the province by persons or groups appearing before us at the public hearings. Even the Consumers Association of Canada (Toronto Branch), whom one might expect would favour Sunday shopping convenience, appeared on a random telephone survey of 122 members to oppose Sunday being open as a general shopping day for groceries, clothing and other household items, by a substantial majority (73% for groceries, 90% for clothing and 84% for other household items). The main reason given by a majority of those surveyed was that open Sunday selling would likely raise costs.

The results of a public opinion telephone survey conducted by the Sault Ste. Marie Chamber of Commerce among 177 persons in that community revealed that approximately two-thirds (65%) were not in favour of removing restrictions from Sunday retail and commercial activity.

The telephone survey initiated by R.A. Beamish Stores Co. Limited in Ottawa was even more decisive in reflecting opposition to store openings on Sundays. A substantial majority (77%) of 179 respondents opposed retail stores being open on Sunday, and most of these (70% of total) said they would not shop on Sundays even if stores were open. In addition, 73% indicated that more traffic, noise and general activity would be experienced if retail stores were to be open, and 60% reacted unfavourably towards this. The minority (27%) who indicated they would shop on Sundays were divided between a desire to shop for everything (10% of total), groceries (7.8% of total), and clothing (5% of total).

Two other surveys were taken by church groups. The brief submitted jointly by the Anglican and Roman Catholic Dioceses of Toronto reported that spot surveys of 70 store operators had been conducted in North Toronto and Peterborough, and that an overwhelming majority opposed Sunday openings. The following were the results.

Survey of store operators conducted by
the Anglican and Roman Catholic Dioceses of Toronto

Number of respondents – 70

Presently closed on Sunday	62
Presently open on Sunday	8
In favour of Sunday opening	6
Opposed	64
Would stay open if others did	7

Would not stay open.....	59
No comment.....	4
Sunday opening would affect family.....	55
Sunday opening would not affect family....	13
No comment.....	2

The brief received from the Anglican Diocese of Huron reported that a recent survey taken in Windsor by students in the Department of Sociology and Anthropology at the University of Windsor showed that only one person in four wanted Sunday as a general shopping day. Only one in five was prepared to put up with the increased noise, traffic and general activity created by those who did and only one in four was willing to undergo the environmental changes which would result.

The only survey brought to our attention showing a degree of public acceptance of Sunday shopping was that taken by Dixie Fruit Market Limited through questionnaires placed on Sundays in its supermarket located on Highway 5 west of Toronto. This supermarket opens regularly on Sundays. A total of 365 questionnaires were answered by shoppers who in most cases gave their names and addresses. These questions and the responses received include the following:

1. What types of articles are you purchasing today? Vegetables (262), Meat (238), Groceries (286), Other Articles (202).
2. Would you like Sunday to be open as a general shopping day for groceries and other items normally sold in a supermarket? Yes (292), No (72).
3. What days of the week do you normally work? Monday-Friday (210), Monday-Saturday (135).
4. Does being able to shop on Sundays add to your enjoyment of life? Yes (262), No (61).

Many of the persons favouring Sunday shopping mentioned "convenience" as the main reason why they liked it.

This survey can hardly be considered to be representative of *all* consumers since those persons who answered the questionnaire were actually shopping in a store which participated in the very activity about which questions were being asked, i.e., Sunday food retailing. Yet, significantly, 72 out of the 365 (19.7%) shoppers answering the questionnaire in this store actually stated they opposed Sundays being open for general shopping. In fairness, though, representatives of Dixie Fruit Market Limited submitted these survey results "only for the purpose of putting before [us] the views of the shoppers", and did not maintain that they were representative of all consumers in the province.

Consumer surveys on Sunday shopping, conducted by students in the School of Business Administration at the University of Western Ontario, were also made available to us during the course of our

deliberations. Their results were largely consistent with the results of our own survey conducted by the Social Survey Research Centre and the other independent surveys brought to our attention. There were four separate consumer surveys conducted by these students: two in London (one by telephone involving 100 respondents; another by personal interview involving 114 respondents), one in Ottawa (by mail involving 109 respondents) and one in Toronto (by mail involving 139 respondents). The answers on the four separate surveys were surprisingly similar, despite the different interview methods. The following table shows a breakdown of some of the questions which were used in more than one of the surveys, and the responses to each of those questions:

SUMMARY OF CONSUMER SURVEYS

conducted by students in the School of Business
Administration at the University of Western Ontario
(all figures in this table are expressed as percentages)

Question	Data Collection Method and Sample Size			
	Telephone (London) n = 100	Personal (London) n = 114	Mail (Ottawa) n = 109	Mail (Toronto) n = 139
1. Do you have any problems shopping during the week?				
Yes	30		16	
No	70		84	
2. How many retail stores should be open on Sunday?				
All	14	21		
More	15			
Same as now	51	60		
Fewer	5			
None	15	19		
	Telephone (London) Yes No DK	Personal (London) Yes No DK	Mail (Ottawa) Yes No DK	Mail (Toronto) Yes No DK
3. Which of the following retail stores would you like to have open on Sundays?				
Supermarkets	32 52 16	26	30	15 49 36
Department Stores	31 53 16	12	20	13 48 38
Dry Cleaners	11 74 15		7	8 48 44
Banks	15 74 11	6	10	13 50 37
Sporting Goods				7 48 45
Hardware	9 77 14		5	10 47 43
Car Dealers	17 70 13	6	3	7 47 46
Clothing/shoe	15 74 11	12	17	
Discount Stores	39 42 19	26	16	12 49 39

It would appear that the University of Western Ontario surveys provide further confirmation of the fact that there is a fairly solid majority of persons in Ontario opposed to any extension or expansion of Sunday shopping into stores not now open. In these surveys, there also appeared to be a small, but hard core minority ranging from 10–30% who wanted more stores open on Sundays. This fluctuating minority group seemed to be more interested in supermarkets, discount stores and department stores, and less interested in dry cleaners, hardware stores, banks and car dealers. The one characteristic of these student surveys which did not emerge on our own attitudinal survey or those taken by other groups, was the incidence of respondents not holding any opinion on the issue, as signified in the reply “Don’t know”. Whether this result indicates a variation in the interview techniques of some of the students as compared with techniques on the other surveys, or actually points to a high degree of ambivalence among people on this issue is not entirely clear. Certainly our own attitudinal survey did not indicate this degree of ambivalence, and we found that in the briefs and public hearings people tended to have very definite opinions on the Sunday shopping issue.

In conducting their surveys, the students at the University of Western Ontario attempted to determine the characteristics of those people opposing Sunday store openings. Again, their results were consistent with our own attitudinal survey. They found that opposition toward Sunday opening was more prevalent among the following groups: older people, females, upper income, single, and persons living in smaller communities. Their counterparts favouring more stores open on Sundays tended to be male, middle income, younger, married and living in the suburbs.

For comparative purposes, we obtained attitudinal statistics from the Burgoyne index in the United States indicating public attitudes towards supermarket openings on Sunday in nine American cities, over a period of fourteen years. The following table was obtained:

MORE THAN ONE OUT OF TWO SUPERMARKET SHOPPERS APPROVES
SUNDAY OPENING OR IS INDIFFERENT *

“Some supermarkets (I don’t mean delicatessens) stay open on Sunday. What do you think of this plan? Would you say that you approve or disapprove?”

[illegible]

	AVERAGE				
	1968	1967	1963	1958	1954
Approve.....	24%	30	23	20	21
Disapprove.....	46	44	50	51	51
Makes no difference.....	30	26	27	29	28
Total.....	100%	100%	100%	100%	100%

*Source: Burgoyne Index

It will be seen that consumer reaction in the U.S. fluctuates, depending on the city and area one is surveying. Perhaps most significant for our purposes is the slow but gradual trend towards a greater public approval or indifference towards Sunday shopping, and a reduction in the percentage of those who disapprove. For example, in 1954, 51% of the U.S. respondents disapproved of Sunday shopping in supermarkets, while in 1968 it had decreased to 46%. We have no way of knowing whether such a trend would exist in Ontario, since attitudinal statistics on this question were not kept in earlier years. However, the 1968 Burgoyne statistics would certainly seem to indicate a far more liberal attitude towards Sunday openings in the United States supermarkets than our own attitudinal survey revealed respecting large food supermarkets (14% wanting all to be open, 11% wanting some, 73% wanting none, and 2% don't know). In short, opposition to Sunday food shopping is significantly greater in Ontario than in the U.S.

We were particularly impressed by the unanimity among all the business men's associations, chambers of commerce, trade and retail merchants' associations and like groups which actually engage in retail selling who came forward with a brief or at the public hearings in opposition to Sunday retail selling. These groups included the Sarnia and District Chamber of Commerce, the Greater Toronto Business and Professional Federation, the Toronto Automobile Dealers Association, the Yonge-Bloor-Bay Association Inc., the Canadian Shoe Retailers' Association Incorporated, Ontario members of the Associated Stores of Canada, the Ottawa Real Estate Board, the Canadian Retail Hardware Association, the Garage Operators' Association of Ontario (in respect of non-essential services), the Greater Grimsby Business Men's Association, the Downtown Windsor Business Association, the Greater Niagara Chamber of Commerce (in respect of non-tourist establishments), the Hamilton Downtown Association, the Windsor Chamber of Commerce, and the Brampton-Chinguacousy Chamber of Commerce. These groups were in addition to a substantial number of individual retailers and labour councils who opposed Sunday retailing. Eight of the above groups had taken the trouble to poll their membership on the Sunday retailing question, and the responses in many cases provided the basis of the briefs or oral submissions at the public hearings put forward by these groups. The Canadian Retail Hardware Association, for example, mailed 819 questionnaires to its Ontario members on this

question and 525 (or 64.1%) were returned, representing a cross-section of hardware dealers from all areas of the province. The Garage Operators' Association of Ontario had responses from 234 of its members, representing approximately 25% of its total membership. The Sarnia Chamber of Commerce based its submissions on replies to a questionnaire from 50 of its retailing members, and the Brampton-Chinguacousy Chamber of Commerce submission was based on 65 replies to a questionnaire mailed out to 150 of its members. The Yonge-Bloor-Bay Association Inc. received replies to a questionnaire from over one hundred businessmen in the central area of Toronto. Considering these and the other groups polling their members, the retail community in Ontario has provided substantial input on the Sunday question and they are decidedly opposed to any further extension or expansion.

B. RECREATIONAL, ENTERTAINMENT AND CULTURAL FACILITIES

The attitudes and opinions expressed in the briefs and at the public hearings were not quite as decisive in this area as they were with Sunday shopping, but generally the public appeared to favour more recreational, entertainment and cultural facilities being opened on Sundays. The majority felt that this was consistent with their view of Sunday as a day free from work to permit rest, leisure, recreation and family activities. Many persons felt that the traditional notion of Sunday merely as a day of rest was only half true now, and that activity levels in various forms of leisure, recreational and family pursuits might in fact be higher on Sunday than on any other day of the week. This was thought to be the case particularly with young people.

A minority of those persons or groups appearing seemed to oppose any further extension or expansion of Sunday sports or entertainment facilities, particularly those sports or facilities which were commercial in nature. This opposition was predominantly from among church groups, although there were some individuals who took this position as well. Their view seemed to be consistent with the notion that Sunday should be protected primarily as a day for religious observance, and that commercial sports, entertainment and cultural activities which in any way might interfere with Sunday religious observance should not be allowed. Several persons among this minority spoke of the "continuing erosion of our Sunday in Ontario" by virtue of the existing legislative permission granted for Sunday sports, movies, concerts, fairs, and horse races.

Some of the minority group opposing any further extension or expansion of activities on Sunday in this area drew a clear distinction between professional and amateur sports. They would prohibit the former but not the latter. However, in response to our queries during the public hearings, they often admitted the difficulties in distinguishing between professionalism and amateurism, particularly in the light of the fact that admission is charged at many amateur sporting events (including amateur hockey, football and baseball) and that some "amateur" players are paid. Many of these persons also qualified their desire to

prohibit professional Sunday sports by admitting that it would be very difficult for the government to turn back the clock since professional Sunday sports had been a fact of life in many Ontario communities for twenty years, and brought pleasure to many people.

Others among the minority group attempted to make qualitative distinctions between which sporting, entertainment or cultural activities should be allowed on Sundays and which should not. Some suggested that the government might prohibit, for example, billiard halls, discotheques or horse races, but allow public golf courses, symphony concerts and commercial art galleries. However, we were unable to obtain any objective criteria for the making of these qualitative distinctions vis-à-vis Sundays, the persons putting them forward relying only on subjective experience in making their judgment as to what activities were generally desirable or undesirable *per se*.

Not all the church groups opposed any extension or expansion of recreational, entertainment or cultural facilities on Sundays. In fact, a good many considered that the removal of a number of the restrictions in this area, particularly to permit more family activities of interest to young and old alike, would be consistent with the Christian concept of Sunday as being a family day. A case in point was the oral submission of Archbishop Pocock, representing the Roman Catholic Archdiocese of Toronto and all the Roman Catholic bishops in Ontario, who emphasized the need for a sense of "community" made possible through Sundays in the parks or at concerts or at various recreational pursuits with family and friends, as well as through Sunday worship. Bishop Snell, representing the Anglican Diocese of Toronto, also referred to the notion of "community" and said he approved of Sunday recreational and cultural activities such as professional sports and concerts for a price—as long as they were consistent with the notion of community among family and friends and did not interfere with community worship.

Much of the church opposition seemed to be directed against professional sports and entertainment activities for the primary reason that so often they employed large numbers of people on Sundays, persons who would be deprived of the opportunity to be with their families during a portion of that day. A secondary reason for the opposition of course was that some recreational, entertainment and cultural activities on Sunday might interfere with church attendance and participation in other church-centred activities on that day.

It must be emphasized that the views opposing the extension or expansion of Sunday openings in this area were minority views. The majority view which came across in the briefs and public hearings was that the public would like *more* of these activities.

These views and opinions were borne out by the province-wide survey results obtained by our attitudinal researchers, as reflected in the following table:

Entertainment Or Recreation Facilities Where Admission Is Charged	Percent Of Ontario Residents 18 And Over			
	Opinion As To Whether Each Type Of Entertainment Or Recreation Facility Should Be Allowed To Stay Open On Sunday			
		Yes	No	Don't Know
Provincial/Municipal Parks.....	%	92	7	1
Public Swimming Pools.....	%	90	8	2
Ski Areas.....	%	87	10	3
Art Galleries And Museums.....	%	87	11	2
Amateur Sports.....	%	74	23	3
Professional Sports.....	%	73	24	3
Cultural Events, Concerts, Operas, Plays.....	%	73	23	4
Movies.....	%	71	26	3
Bowling Alleys.....	%	67	29	4
Public Libraries.....	%	65	31	4
Fairs And Exhibitions.....	%	60	38	2
Dances, Discotheques, Coffee Houses.....	%	46	50	4
Horse Races.....	%	45	51	4
Billiard Halls.....	%	43	53	4

Sunday openings for parks, public swimming pools, ski areas and art galleries and museums received overwhelming support. Almost nine out of every ten respondents favoured Sunday openings for these activities. Also, a significant majority favoured Sunday openings for each of the following: amateur sports; professional sports; cultural events, concerts, operas, plays, movies; bowling alleys; public libraries; and fairs and exhibitions.

A minority of the respondents on the survey attempted to make the same type of qualitative distinctions made by some groups in the public hearings by virtue of the fact that responses to the question of Sunday openings for dances, discotheques, coffee houses; horse races; and billiard halls were split, with just slightly less than half of the respondents in the survey in favour of Sunday openings.

The survey conducted by the Sault Ste. Marie Chamber of Commerce of residents in that community asked a question as to whether they would be in favour of removing more or all of the restrictions on Sunday sports for profit. Approximately 60% said they would be in favour,

and another 6% said that it did not matter. Approximately one-third opposed the removal of restrictions on Sunday sports for profit. These results indicate that there is slightly more opposition to professional sports in Sault Ste. Marie than there is on a province-wide basis (24% of the province-wide survey group were opposed to professional sports).

We received submissions from a number of persons and groups engaged in particular areas of recreation, entertainment and culture. Understandably, these submissions were favourably disposed towards increased Sunday activities in the areas concerned, but they also provided useful indicators of the changing attitudes of people in Ontario who patronize these types of facilities. For example, Milton Carman, then Executive Director of the Ontario Council for the Arts, asked us to consider the whole question of leisure pursuits and the cultural revolution particularly among young people, and to relate it to Sunday. He suggested that Sunday should be considered not so much a day of rest, but a day of creativity. In his view, people are no longer content to be spectators appreciating the arts; they want to participate, and this entails direct involvement in parks, in theatres, in parades, in festivals, all of which are ideally suited to Sunday, the day on which individuals and families are together free from work or school obligations. These activities, involving a greater participation, are not necessarily consistent with the notion of "rest" on Sundays, and might well involve more noise and activity than exist on other days of the week. Therefore he urged that Sunday activities must be expanded, not restricted, and that government should seriously consider the new art forms: films, psychodrama and guerilla theatre, multi-media poetry and other forms of kinetic exposure. He explained that there will be some people who will complain about the increased noise and activity, and this might make it necessary to zone certain areas in each community for peace and quiet, and have other areas as places of "Sunday excitement". In his opinion, the sensorial rewards from participation of this nature on the pause day would provide a far more meaningful Sunday for the younger generation than the traditional day of rest.

Peter Swann, Director of the Royal Ontario Museum, told us that Sunday has always been a time of maximum attendance at the Museum, and that even in the light of competition from other cultural facilities in the province, the numbers are increasing. He cited Sunday as a time when many working people visit the Museum, many willingly, some dragged there by their children. Yet, because of budget restrictions, the Museum was limited to between the hours of 1-5 p.m. on Sundays. He felt that cultural pursuits, so long under-supported in Canada, must certainly be reexamined with a view to their encouragement, and that the people should be offered preferable alternatives to work and these should be available at all times when they are needed. He concluded that the effect of Sunday openings in general on the health, certainly the cultural health, of large numbers of the population, might well be salutary, and that for an institution like the Museum certainly more people could avail themselves of it. His major concern was with the cultural resources of the province, and he suggested that culture in one form or another was rapidly becoming a faith for young people, taking the place of formal religion. Given adequate financial resources,

he would be prepared to open the Museum Sunday mornings and felt that there would be good attendance, certainly sufficient to keep the guard staff busy and the restaurant open. A significant portion of Sunday patrons of the Museum is from among the ethnic population of Ontario, at least 25% are children on Sundays, and many families are present.

The Executive Secretary of the Dominion Drama Festival favoured a staggered pause day so as to permit the greater utilization of all facilities, cultural as well as recreational. However, he stated that this might create a problem of dislocation of the "communion and working one with the other so essential in the performing arts". His brief did not comment on the desirability of plays being performed on Sundays, although it was implicit that he would so favour.

Submissions were received from the directors of four of the public libraries in the province, in London, Parry Sound, Windsor and Cochrane. All four cited the difficulties of obtaining sufficient financial support to provide Sunday service. London several years ago opened the library on Sunday afternoons for reference purposes, but despite high usage the service was curtailed for financial reasons. The Parry Sound library has never opened on Sundays, and the director felt there might be stiff opposition from members of the staff if it were ever proposed. The main Windsor public library is now open from 2-5 p.m. from October to April, a total of twenty-five Sunday afternoons, and full library services are provided. The director cited the difficulties of recruiting and maintaining staff, and in employer/employee relations generally, since many employees did not like to work Sundays, preferring to spend the time with their families or with friends or at recreation. He recommended that if it is desirable to have public library services on Sunday, suitable labour legislation and public library legislation be enacted to ensure that adequate financial support be provided for the service. The representative from the Cochrane Public Library Board said there was no public demand for Sunday library facilities in his area.

The Ontario Parks Association presented a brief prepared by Harold A. Brain, Executive Director and Chairman of the Legislation Committee. He cited the great increase in the desire of people to engage in participatory rather than spectator sports and recreational activities particularly on Sundays, and in this respect his submission was similar to that of Milton Carman's respecting participation in the arts. In his opinion, the creation of Ontario's Conservation Area System and the enlargement of the Provincial Park System had been a major factor in the development of Sunday as a family recreation day in this province. He noted that in 1969, of 235,600 vehicles entering Conservation Areas, 45,000 came during weekdays, 20,000 on Saturdays, and 170,600 (or 72%) on Sundays. Each vehicle on Sundays averaged approximately four occupants, and most were families. While he felt a staggered pause day might alleviate the crowding in parks and recreational facilities, he felt it would complicate the logistics of a family outing, particularly where families had children of school age. He viewed recreation opportunities as a unifying factor in the preservation of the family unit, and he deemed this to be a paramount consideration. As far as parks employees

were concerned in Sunday operations, he stated that the usual practice was to employ only those persons engaged in tolls, supervision and life-guard work. Maintenance crews were employed during the week. No premium rates were paid for Sunday work.

Submissions were received from three of the major fairs and exhibitions in the province: the Canadian National Exhibition, the Royal Winter Agricultural Fair and the Western Fair in London. All three groups pointed to the difficulties they had encountered in 1968 and 1969 with the 1.30 p.m. starting time imposed by the legislation. Both the C.N.E. and the Western Fair experienced large crowds and traffic jams in the area of the entrance gates in the period before the 1.30 starting time, and it took some time after that hour for all the people to be properly admitted. All three fairs did reasonably well on Sundays in the first two years in which this was legally possible (attendance figures are cited in the next chapter), although Sunday attendance rates never reached the same level as on Saturdays. But neither did the additional Sunday attendance hurt attendance on other days of the week. Both the C.N.E. and the Royal Agricultural Winter Fair requested that they be allowed to open their exhibits and begin their shows at 12 noon on Sundays, with patrons being allowed to enter the grounds prior to that time. The general manager of the Western Fair Association favoured an opening time of either 10 a.m. or 11 a.m., although he would prefer to have no restrictions as with the other days of the week, letting crowd demand determine the hour. He reported that some of the church groups holding concession rights for the sale of food at the Western Fair had agreed to open Sundays when the Fair Association first made the decision in 1968, although some of the churches had objected initially. Apparently, the local church groups have prospered by virtue of this extra day of sales at the Fair.

The only submissions received from persons involved in horse racing were from officials of the Jockey Club Limited. They noted that since their first programme of Sunday racing was commenced at the Fort Erie track on July 28, 1968, Sunday has become clearly the most popular day of the week for thoroughbred horse racing at Fort Erie and Woodbine, the only two tracks operating on Sundays (actual attendance statistics will be given in the next chapter). The Jockey Club officials' main point was that there will continue to be a growing demand for outlets for recreation and entertainment such as horse racing, and that as many of these services as possible should be made available. They noted that after a full year's experience of Sunday operations, both day and night, there had been no evidence of dislocation, or inconvenience, or disruption of community life. In fact, Sunday patrons at the track tended to be younger, and more of them attended with their families. Also, *per capita* wagering tended to be lower on Sundays than on other days. This led to the conclusion that Sunday at the races tended to be a "family outing", and in this regard the Jockey Club has increased picnic facilities for the convenience of the public.

The Executive Vice-President of the Jockey Club maintained that all those who accepted employment in the racing also accepted as a matter of course Sunday work without premium rates. They stated they had resisted paying employees premium wage rates, since they did not wish to charge special admission prices and parking rates on Sunday: this would be merely a form of discrimination against the public and exploit the fact that Sunday is, in practice, the day when the public is best able to make use of their facilities. Despite these comments, it is significant that several weeks after the appearance of the officials of the Jockey Club at the public hearings, there was a labour dispute and a strike between the Jockey Club and its employees at the Greenwood and Woodbine tracks, one of the major issues of contention being premium rates for Sunday work.

Finally, the Jockey Club recommended that the 1.30 p.m. starting restriction be removed, and that races be permitted to commence at a time more convenient to the public, particularly in the late fall, when darkness comes early. He felt that this imposed starting time discriminated against racing as compared with other public entertainments such as bowling and sports such as golfing.

Finally, several groups in briefs or at the hearings expressed strong opinions concerning the availability of recreational facilities on Sundays in general. For example, Dr. Glenn Sawyer, General Secretary of the Ontario Medical Association, after advocating maintenance of a uniform pause day throughout the province, made the following comments:

The "weekend syndrome" appears to exist more from the gross deficiency of Government in providing adequate recreational opportunities for the citizens of the province rather than a reduction of the work week per se. Rather than directing attention to a redistribution of the work week it would seem more relevant to us that Government direct its attention to the provision of recreational facilities on a broad basis to the citizens.

Both the Hamilton and Kitchener Religious Societies of Friends (Quakers) urged the legislative protection of the pause day, but noted that the positive value of such a pause day can only be realized when adequate recreational, cultural and social programmes are provided. The Hamilton Quakers stated:

Our civic priorities for recreational facilities must be put higher. Provisions of public parks, beaches, swimming pools, etc., should be civic statutory obligations in all future town planning, zoning and building laws.

Mrs. Robert Simmons, an executive officer of the Hamilton Branch of the Canadian Consumers' Association, expressed concern about the lack of things to do on Sunday for people living in high rise apartments in the cities. In her view, government had an obligation to make Sunday a happier day through encouragement or even provision of recreational, entertainment and cultural facilities, and that it should not be considered evil if these facilities were commercialized and made

a profit as long as more activities of a wholesome nature (other than Sunday shopping) were provided.

While there were several other submissions urging more recreational, cultural and social activities on Sundays, there were just as many submissions concerned that a rapid expansion of recreational facilities on Sundays should not be allowed to cause undue exploitation of those persons employed to run these facilities. Certainly this was the position taken by many of the religious groups, although most of them were hard pressed under questioning as to where to draw the line. As suggested earlier, some of these groups would prohibit professional sports on Sundays, but not amateur sports. But under questioning they admitted difficulties in distinguishing between the two in some areas, and also found it difficult to distinguish between attending professional sporting events on Sundays, and watching Sunday professional sporting events on television from the U.S. (widely acknowledged to be a common activity among many Ontario males). The Lord's Day Alliance of Canada steered a middle course on this issue, as indicated in the following statement from its brief:

While some want Sunday for rest and quiet, others attach greater importance to its recreational opportunities. A few years ago argument was put forward for allowing commercial forms of sport and entertainment on Sunday because it was a day free from work. This was represented as reasonable provision for people with nothing else to do. The proponents of such activities desired Sunday to be kept free from work ordinarily associated with making a living. While this Alliance has pointed out flaws in that position, we suggest it has at least sufficient strength to warrant Sunday recreation being given the legal protection which is necessary to save it from being eliminated by any wider permissiveness to non-recreational types of businesses.

C. SUNDAY EMPLOYMENT

The available economic facts concerning Sunday employment in Ontario have already been noted in the previous chapter. Here, we are concerned with the attitudes and opinions of those persons most affected by commercial activities on Sundays—the employees, their unions or other persons with whom they are closely associated. Submissions opposing Sunday employment wherever possible were received from the Ontario Federation of Labour, the Provincial Building and Construction Trades Council of Ontario, the Oshawa and District Labor Council, the Kitchener-Waterloo and District Labour Council, the Sarnia and District Labour Council, the Kenora-Keewatin and District Labour Council, the Christian Trade Unions of Canada, and the Christian Labour Association of Canada. These groups maintained generally that, given the choice between Sundays off and working Sundays at premium rates, the great majority of their men would prefer the former. Premium rates for Sunday work were provided for in most union contracts brought to our attention, except for a few industries such as hospitals, in which Sunday work was accepted as a matter of course. Most of the union groups insisted that the premium rates for Sunday work were demanded not so much as a vehicle for obtaining more money for their men, but as an inducement to employers to curtail Sunday work as much as possible.

This position is substantiated to a certain extent by the fact that many union contracts call for double time rates for Sundays and holidays, while only time and a half rates are paid for additional evening hours. This is particularly true for collective agreements in the Ontario construction industry.⁵ Reports of union negotiations in the food retailing industry in Ontario in 1970 indicated that demands for triple time for Sunday work have been made, and even double time for part-time employees working Sundays. In fact, employees of Dominion Stores Limited in August 1970 actually obtained a contract calling for double time rates for *both* full-time and part-time employees for Sunday work. Apparently demands of this sort are being made on food retailing employers to induce them to avoid Sunday openings wherever possible, or at least to keep down the size of their Sunday staff. The position of pulp and paper employees in Ontario working on continuous seven-day operation was noted in the previous chapter: a premium of 10–15¢ an hour for every hour of the week worked is generally added upon commencement of continuous operations, together with either time and a half or double time rates for actual work performed on Sundays. Yet the representative of the Kenora-Keewatin and District Labour Council, himself a pulp and paper employee, told us at the public hearings that if his union could go back to the days immediately prior to the time when it gave up Sundays off to the collective agreement (i.e., agreed to continuous seven-day operations) in exchange for the across the board increase and premium rates, the union would probably try to reserve more Sundays for the family life and recreational pursuits of the workers than provided in the present union agreement.

Apart from the above union groups, a number of retail employers⁶ and church groups cited the widespread opposition among the labour force to Sunday work. The reasons given most often were that Sunday work does substantial damage to the maintenance of the family unit and also does not permit the type of periodic pause day at the time when a person can engage in various recreational and social activities with his friends. The churches, of course, also mentioned that Sunday work did not permit proper religious observance through regular church attendance.

Our attitudinal researchers inquired of the 502 persons in the province-wide survey as to the amount of time they would spend with their family if Sunday laws were completely relaxed to permit all businesses to open. While 67% replied that widespread Sunday openings would not have a measurable effect on the amount of time spent with the family (i.e., they replied "about the same"), a substantial minority (26%) claimed that widespread Sunday openings would result in less time spent with their family. This survey was based on opinions only and not actual behavioural facts, but it is indicative of the *possible* effect of widespread Sunday openings in Ontario. Undoubtedly, many of the persons in the 26% would be those who could foresee themselves having to work on Sundays, and the inverse relationship between

⁵See Hours, Wages and Related Payments in the Ontario Construction Industry (1970), prepared by the Research Branch of the Ontario Department of Labour.

⁶Ontario Members of the Associated Stores of Canada, Gordon MacKay & Stores Limited, Yonge-Bloor-Bay Association Inc., the Canadian Retail Hardware Association, and the Canadian Shoe Retailers' Association.

Sunday work and the amount of time spent with families is reasonably clear.

The survey conducted by the Sault Ste. Marie Chamber of Commerce in that community revealed that 39.4% would be willing to work on Sundays if the law permitted it, while 56.8% would not be so willing (with 3.8% stating "does not matter"). In reply to another question concerning willingness to go on a shift schedule that includes Sunday if Sunday becomes just another working day, 40.4% said they would be willing, while 53.5% said they would not (and 6.1% said "does not matter"). This latter group of figures is a reflection of the fact that shift work including Sundays would not involve as much Sunday work as under the first question, which implied regular, rather than staggered, Sunday work. But in any event, well over 50% of those surveyed in Sault Ste. Marie definitely opposed Sunday work, and this is in the face of the fact that Sault Ste. Marie is a community with a long history of continuous seven-day production in such industries as primary steel production and pulp and paper.

The Yonge-Bloor-Bay Association Inc. conducted a survey of merchants and business men in one of Toronto's major shopping areas. In addition to being opposed to the Sunday opening of stores as noted earlier in this chapter, approximately 83% of the respondents replied that they would neither like their businesses to be open on Sundays nor would like to work on that day. Admittedly, the survey was not representative of *employees*, but it was an indication of the general feeling of large numbers of persons in the retailing industry.

The primary concern of the Lord's Day Alliance of Canada in its brief and in the public hearings appeared to be the preservation of Sundays from work. Generally, commercial activities on Sunday which did not require persons to be employed on that day were considered acceptable by both the President and the General Secretary of the Alliance, such as coin-operated vending machines and gas pumps, or self-service car washes. Neither did they oppose recreational activities in which *some* persons would have to be employed, preferring instead a utilitarian test of the "greatest good for the greatest number". The current emphasis of the Alliance on the labour, as compared with the religious aspects of existing Sunday observance laws is illustrated by the fact that its brief recommended that the federal *Lord's Day Act* be renamed to something like "The Common Weekly Day of Rest Act".

The only groups which attempted to make a positive case for Sunday work in the public hearings were representatives of the pulp and paper industry. In fairness, their submissions certainly did not attempt to extol the virtues of Sunday work, but took the position merely that continuous seven-day production was a matter of both technical and economic necessity because of the complex nature of and high capital investment in production equipment and because of the competitive disadvantages of Ontario producers on world markets (reviewed in the previous chapter). It appears that the pulp and paper industry has done much to alleviate the hardships of Sunday work such as the

regularization of shift schedules and the payment of premium rates and across the board pay increases.

D. LOCAL OPTION

This was the one area where public opinion expressed in the briefs and public hearings varied significantly from that reflected in the province-wide survey of attitudes and opinions conducted by our attitudinal researchers.

In our memorandum to assist persons preparing briefs, which was circulated throughout the province well in advance of the hearings, we included this question: "Should each local municipality be allowed to determine the extent of Sunday observance by bylaw, or should conditions be uniform across the province?" No attempt was made to pose the question separately in respect of commercial business establishments as opposed to recreational, entertainment and cultural facilities. The overwhelming response of those who addressed themselves to this question in the briefs and at the public hearings was that conditions of Sunday observance should be uniform across the province. This group included all the church groups (with one exception⁷); all the provincial and local labour associations (also with one exception⁸); a number of the trade associations such as the Canadian Retail Hardware Association and the Sarnia Chamber of Commerce; several large retail organizations including R. A. Beamish Stores Co. Limited, the Ontario members of the Associated Stores of Canada, and the Albert Britnell Book Shop Limited; and individuals representative of certain institutions such as Peter Swann, Director of the Royal Ontario Museum, and John Hill, Executive Director of the Dominion Drama Festival. The only persons or groups who argued in favour of municipal control of Sunday observance were the Mennonite Conference of Ontario, the Oshawa and District Labor Council (which recommended certain minimum province-wide standards, with municipalities deciding by plebiscite the activities to be permitted Sundays in the areas of culture, sports, recreation, and the sale of essential items), the Garage Operators Association of Ontario (which recommended, after polling its members, that only essential retail

⁷The Mennonite Conference of Ontario favoured local control of Sunday observance. All other religious groups or representatives of religious organizations favoured province-wide controls except perhaps the Evangelical Fellowship of Canada, which recommended that essential food services be permitted only by outlets licensed by municipalities on a rotationary basis. Rev. Andrius Kaellgren, Vice-President of the Sault and District Ministerial Association, favoured decisions made as to openings by the municipality in which the business proposed to be opened was located; however, his views were merely personal and not necessarily representative of his Association.

⁸The Oshawa and District Labor Council favoured local legislation of a permissive nature with province-wide prohibitions. All other labour groups opted for province-wide control although the original brief presented by the Kenora-Keewatin and District Labour Council favoured local option and became modified only when the representative of the Council explained at the public hearings that the original view was an expression of the alienation felt by many persons in northwestern Ontario as a result of past province-wide decisions inappropriate for their area. That Labour Council's final position was that store-closing regulations should be on a province-wide basis.

services be allowed Sundays under a system of permits issued at either the municipal or county level in a manner which would implement a rotational plan), and the Greater Niagara Chamber of Commerce (which recommended that each municipality be allowed to adjust Sunday openings to local conditions peculiar to the area, but admitted that there might be a need for overriding province-wide restrictions in such areas as the opening of large-scale supermarkets). The Mennonite Conference of Ontario reasoned that each community's circumstances should determine the nature of the legal restrictions it wished to impose. They noted that work demands of a steel mill city such as Hamilton were sufficiently different from those of a small town, and what was fair and necessary in one might not be fair and necessary in the other.

Several of the groups making submissions in the recreational, entertainment and cultural areas also appeared to favour province-wide controls. In addition to the Executive Directors of the Royal Ontario Museum and the Dominion Drama Festival noted above, a submission was received from the Jockey Club Limited recommending that the requirement of local approval be reviewed and rescinded on the grounds that many entertainment and recreational facilities, such as horse racing, are used by persons other than those resident in the local community where the facility might be located. The example of the Fort Erie race track was cited as being attended by persons coming from a hundred mile radius with very few residing in the township of Bertie which was required under existing legislation to pass the sanctioning bylaw. They also cited the race tracks at Mohawk and Garden City in a similar light. They noted that race tracks in Ontario produce substantial revenues for the provincial government from the tax on *pari mutuel* wagering, and therefore it was anomalous that local approval be obtained before horse races be conducted on Sundays.

The Ontario Motor Coach Association suggested that allowing local municipalities to determine the extent of Sunday observance might be detrimental to the transportation industry, and therefore recommended that uniform conditions be enacted across the province.

The province-wide attitudinal survey reflected a much greater public sympathy for *local* control and regulation of Sunday observance, in marked contrast to the position taken by most groups in the briefs and public hearings. Our attitudinal researchers asked each of the 502 persons in the province-wide survey group the following question: "Overall, who do you feel should decide on which types of businesses [the 28 different businesses referred to in the first part of this chapter] should stay open on Sunday and which types should close: (a) each municipal council; or (b) the provincial Government; or (c) the people of each local community through a referendum (plebiscite or vote) called by the municipal council; or (d) federal Government; or (e) don't know?" The following is the percentage breakdown of responses:

Opinion As To Who Should Make Decisions On Sunday Openings	Percent Of Ontario Residents 18 And Over
	%
Federal Government	9
Provincial Government	14
Municipal Council	16
Municipal Referendum	52
Other	1
Don't Know	8

Over two-thirds (68%) preferred these decisions to be made at the local level, either through a municipal referendum (52%) or by the municipal council (16%). Only 14% thought the decisions should be made by the provincial government, and only 9% by the federal government, which now administers the existing substantive legislation on the subject.

These results from the province-wide survey, indicating strong support for decisions as to Sunday opening being made at the local level, were somewhat at variance with responses to the same type of question posed by those conducting the survey for the Sault Ste. Marie Chamber of Commerce in that community. The 177 respondents in Sault Ste. Marie were asked: "Do you feel that legislation regarding religion should be local, provincial or national?" The following were the results:

Local	— 34.1%
Provincial	— 42%
National	— 43.9%

Thus the Sault Ste. Marie survey group showed a strong disposition towards matters such as Sunday observance (as a religious matter) being determined through federal legislation (slightly less than half), with approximately one-third favouring local legislation and only one-fifth (22%) favouring provincial legislation.

The results of these two surveys on the local option question must be treated with some caution, however. In the first place, this is a difficult and complex question to ask as part of a highly structured questionnaire designed to permit aggregation of data. It may well be that the question asked by our attitudinal researchers on this matter might not have been understood by many respondents; for example, some might have favoured minimum standards of observance being set provincially, with local variations of a stricter sort permitted, yet this answer could not have been given properly within the structure of the question design. Also, it was apparent at several points in the public hearings that there is confusion in the minds of some people relating to the existing Sunday observance legislation. It is generally difficult for the layman to grasp the general scheme in which the federal legislation sets the restrictions with opt out privileges to the province, and the province in turn delegates the

“permissive” decision to the municipalities for such matters as sports, movies, fairs and horse races, but does not delegate the matter of concerts or recitals produced by non-profit organizations which are permitted on a province-wide basis. Also, the layman might be confused as to the nature of the Attorney General’s prosecutory discretion under section 16 of the federal *Lord’s Day Act*, which might appear to some laymen to render the store closing laws provincial or even local, when in fact they are federal. Finally, there is no way of ascertaining the extent to which those who favour decisions being made at the local level were cognizant of the fact that municipalities derive all their decision making powers from the provincial legislatures, and that municipal decisions (by bylaw or referendum) are theoretically provincial decisions as a matter of constitutional law.

In any event, it is difficult otherwise to explain the variances in attitudes and opinions between the overwhelming majority view in the briefs and public hearings and the responses on the surveys. Our inclination is to put more weight in the submissions made in the briefs and at the hearings, not because the surveys were improperly conducted, but because the question under consideration is more complex than a single response answer can cover.

E. THE ATTORNEY GENERAL’S PROSECUTORY DISCRETION UNDER SECTION 16 OF THE FEDERAL LORD’S DAY ACT

This is a unique provision in the federal Act providing essentially that no prosecution may be commenced in Ontario without the express permission of the Attorney General of the province. Most criminal offences do not require such permission, and the individual citizen may commence a prosecution merely by laying an information before a Justice of the Peace, who, upon being satisfied that a case has been made out, will arrange to have the appropriate charge laid. The detailed reasons for the insertion of this section in the federal Act in 1906 are set forth in Chapter 3. Briefly, the section was designed to prevent the *Lord’s Day Act* from being made an instrument of persecution and harassment.

In our memorandum distributed in advance of the hearings, we asked this question: “Should the Attorney General for Ontario have the discretion as to whether prosecutions should be instituted under the federal *Lord’s Day Act*, and if so, according to what criteria should he exercise that discretion?” Of the many persons and groups who addressed themselves to that question, the majority replied that such a discretion should not exist. These persons and groups included various churches and religious groups, labour associations and councils, trade associations, retailers and individuals.

Only seven out of the 154 briefs received recommended that the Attorney General’s prosecutory discretion under section 16 be retained. This group consisted of three labour groups (the Provincial Building

and Construction Trades Council of Ontario, the Kitchener-Waterloo and District Labour Council and the Kenora-Keewatin and District Labour Council); three church groups (the Salvation Army, the Ontario-Quebec Conference of the Seventh-day Adventist Church and Kingsway Baptist Church, represented by Rev. Edgar J. Bailey); and one specialized retailer (the Laura Secord Candy Shops Limited). The reasons generally stated for retaining the section are best summarized in the following statements, first in the Salvation Army brief:

This would ensure equitable enforcement throughout the province . . .

second in the Laura Secord brief:

If Sunday observance legislation is retained in its present form, the company feels that the Attorney General of Ontario should retain a discretion as to whether prosecutions should be instituted under the Federal Lord's Day Act, or any revision thereof and that such discretion should be exercised within the general framework of maintenance of Sunday as a general day of rest and recreation. Furthermore, permitted Sunday operations which are deemed to be for the convenience or pleasure of the public should extend over a greater variety of operations in high density urban areas of population than in suburban or residential areas.

and third in the Seventh-day Adventist brief:

It is submitted that the present provision requiring the consent of the provincial Attorney General to a prosecution under the Lord's Day Act, is a useful procedural device that has the practical result of helping to prevent frivolous or vexatious prosecutions motivated by a desire to harass, persecute or intimidate the non-conformist neighbour, competitor or rival. There is some basis for the belief that a more objective and dispassionate appraisal of the information can be obtained in the somewhat less accessible chambers of the Attorney General than at a local police station or Crown Attorney's office.

On the other side of the question, at least nine briefs specifically recommended that the discretion provision either be completely abolished or be exercised in such a manner as to make the granting of consent automatic except in clear cases of persecution and harassment. This group of nine included four church groups (Middlesex Presbytery of the United Church of Canada, the St. Catharines Clergy Fellowship, the Evangelical Fellowship of Canada, and the Lord's Day Alliance of Canada); three labour groups (the Ontario Federation of Labour, the Oshawa and District Labor Council, and the Christian Labour Association of Canada); and two retailing groups (the Sarnia Chamber of Commerce, and the Albert Britnell Book Shop Limited). The following statements appearing in briefs are representative of the reasons given, first by the Ontario Federation of Labour:

At present the Attorney-General will not prosecute unless there are complaints from the community. The law should be clarified and enforced whether there are "complaints from the community" or not. Quite often the community affected is another community close by that the law breaker forces the retailers through competition to extend their hours.

second by the Evangelical Fellowship of Canada :

The other problem in this area related to enforcement of Sunday legislation. At present, the consent of the Attorney-General is required before any prosecution may be launched. No doubt this provision was intended to provide some degree of flexibility in enforcing the Lord's Day Act and to ensure that the cases which were prosecuted were limited to infringements of the spirit and not merely the letter of the legislation. However, it is our impression that this requirement merely confuses local police forces in enforcing the Act without serving any really useful purpose, and that it should be removed.

and third by the Lord's Day Alliance of Canada :

We offer an opinion that enforcement of the Lord's Day Act (Canada) is unsatisfactory; it is both inadequate and uncertain. Section 16 required that the Provincial Attorney General be informed of every offence under the Act and that he give consent in every instance before court charges may be laid against an offender. This has given rise to unequal enforcement of the Act, with differences between localities sometimes not far removed from each other. The Attorney General of the province recently stated in the Legislature that enforcement of the Act largely depends upon local opinion. We point out, however, that the official understanding of local opinion is likely to be determined by the initiative, persistence, forcefulness and organizing ability of some individuals, whether argument be pro or con. Some districts are more fortunate than others in the degree of leadership which they enjoy, and people in areas less favoured in this respect, though strongly resenting infractions of Sunday law, may fail to make their feelings known to the Attorney General. His unwillingness to endorse enforcement in some places may accordingly indicate his unawareness of a grass roots desire for Sunday freedom from business and work which a just and equitable enforcement of the law should ensure. An attempt to assess local opinion is not only subject to error. It creates inequalities and confusion. It provides an unsatisfactory basis for enforcement of the law. It encourages lawless behaviour. It even engenders contempt for law. The present hit and miss style of enforcement deprives people of benefits which the Act is intended to ensure. And we hold that the opinion of one public official should not be able to strip an Act of Parliament of its effectiveness.

When Section 16 of the Act was receiving the attention of Parliament it was described as a safeguard against too great a zeal in prosecution over matters of no consequence. Critics in the Opposition believed it would make the Act ineffective, but assurances to the contrary were offered with the above explanation. The unsatisfactory and confusing state of Sunday law in this province would be improved if there were to be an open understanding that the consent of the Attorney General would be regularly given under Section 16, and withheld on rare occasions of the unimportant kind referred to.

Not only were there at least nine briefs submitting arguments for the abolition or paring down of the Attorney General's discretion, but a number of others expressed concern generally about the process of selective enforcement which section 16 permitted, by which stores in some areas were prosecuted but not in others, or by which large supermarkets were required to close but not smaller convenience and jug milk stores. This was regarded by some as a form of discrimination, heaping inequities not only on those retailers required to stay closed through fear of prosecution, but on consumers who generally are required to pay higher prices since they are "captive" shoppers in stores holding a quasi-monopoly position in respect of Sunday sales.

The legal background of section 16 is discussed in Chapter 8. We will set forth certain proposals and alternatives in Chapter 17. In summing up public opinion concerning this section, it appeared that the majority opposition was based as much on the very existence of the section as it was on the manner of its exercise.

CHAPTER 7

PRESENT BEHAVIOURAL PATTERNS OF ONTARIO RESIDENTS ON SUNDAY

S U M M A R Y

A. SUNDAY IN ONTARIO IN 1970

1. Socio-Cultural Institutions
 - (a) The Churches
 - (b) Voluntary Associations
2. Exchange of Goods and Services
 - (a) Jug Milk Stores
 - (b) Supermarkets
 - (c) Restaurants
 - (d) Gasoline Stations
3. Entertainment
 - (a) Television and Radio
 - (b) Moving Picture Theatres
 - (c) Fairs and Exhibitions
 - (d) Horse Races
 - (e) Other Cultural and Sporting Events
4. Transportation
 - (a) Public Transit
 - (b) Road Traffic
5. Socio-Environmental Indicators
 - (a) Crime
 - (b) Motor Vehicle Accidents
 - (c) Noise Pollution
 - (d) Air Pollution
6. A Bird's Eye View of Informal Activity on Sunday
7. Summary

B. SOCIAL EFFECTS OF SUNDAY AS A DAY OF REST

1. University of Toronto School of Social Work Study, 1966-67
2. The Alley Commission Study in Quebec

A. SUNDAY IN ONTARIO IN 1970

To complete the spectrum of the broad sociological background to Sunday observance in Ontario, we considered it necessary to inquire into the current practices or actual behaviour of the people of Ontario on Sundays. This was seen to be a necessary complement to the attitudes and opinions of Ontarians reviewed and discussed in the previous chapter so as to permit useful comparisons between what people generally

believe should be the law respecting Sundays and what people generally *practise* on that day. Also, while attitudinal research can be conducted much more scientifically, based as it is on recognized probability sampling techniques, behavioural research based on direct observation of selected institutions, sites and social processes in various communities can often be more revealing as to the type of social situation which actually prevails throughout the province.

Our behavioural researchers were initially faced with two problems in the collection of data respecting Sunday behaviour:

- (i) in which Ontario community should behavioural investigations be conducted?
- (ii) upon which Sunday activities should such behavioural investigations be focussed in order to obtain meaningful statistical information?

The first problem was met (within the time and resources available) by selecting three "typical" Ontario communities as representative of the province: Goderich, Peterborough and Toronto. Goderich, a town of just over 6,000, was selected as a typical community in rural Ontario. Its most essential characteristic was its relative independence from any major city including the two in closest proximity, Stratford and London (45 and 57 miles respectively from Goderich). Basically, it is the market town for the surrounding farming region with only a few small industrial concerns. Peterborough, a city of around 50,000 was selected as the typical small Ontario city. This community is well recognized as an ideal market-research "test area", composed of a broad cross-section of economic and social strata all within a relatively small area. Metropolitan Toronto, the province's capital, has a population of over two million, almost one-third of Ontario's total. As the province's largest city comprising a mosaic of ethnic and religious grouping, Toronto serves as Ontario's social and cultural Mecca. No study of Ontario behavioural patterns could be complete without the inclusion of this city.

No absolute claim can be made that Goderich, Peterborough and Toronto are representative of the *total* population of the province of Ontario, or that the persons selected for interviews at various locations within those communities are representative. However, behavioural research of this nature, unlike attitudinal research, tends to be more qualitative than quantitative while at the same time allowing the possibility of rough conclusions as to the probability of behavioural patterns in these three communities being an accurate reflection of behaviour across the province.

The second problem relating to the selection of Sunday activities within each of these communities was met through a preliminary telephone survey of 359 persons (45 in Goderich, 98 in Peterborough and 216 in Toronto) selected at random from the telephone books in order to discover the various activities in which the respondents interviewed had engaged during the previous Sunday, and the amount of time spent so doing. Certainly church attendance was an obvious Sunday activity

to be investigated as well as the use of certain recreational and entertainment facilities and certain commercial establishments, such as convenience and jug milk stores and grocery supermarkets open on Sundays. The telephone survey, by serving as a kind of "typical Sunday diary" for those respondents interviewed, provided our behavioural researchers with invaluable insights into the importance of the more informal activities, such as watching television, listening to the radio, visiting friends and relatives, writing letters, going for a drive, resting, etc.

In addition to the telephone survey, our behavioural researchers conducted on-site interviews at 63 locations distributed among Goderich, Peterborough and Toronto. Detailed questionnaires were administered to persons selected at random at each of these 63 locations, each of which fell into one of the following categories: churches, milk stores, supermarkets, movies, special events, and restaurants.¹ In addition to the 63 sites selected in the three communities, our researchers arranged for self-administered questionnaires to be completed at an additional seven sites in various movie theatres operated by the Famous Players chain; four of these sites were located in Toronto and the other three in Hamilton, Burlington and Ottawa.

Goderich and Peterborough presented no problems in terms of which locations to select in the above six activity areas, since our researchers were able to visit practically every location of this sort within the two communities. In Toronto, a large number of possible locations in the six activity areas precluded total sampling, but sites were selected based on geographical location, together with a consideration of socio-economic backgrounds of persons living in the various areas so as to obtain information from as broad a range of persons as possible.

In addition to the 359 persons in the three communities surveyed by telephone, 909 personal interviews were conducted at the 63 locations. Also, 504 self-administered questionnaires were completed at the seven movie sites by the Famous Players chain, making a grand total of

¹The following is a breakdown of the 63 sites by community and activity area:

Number of Sites by Community and Activity Area

	Goderich	Peterborough	Toronto	Other	TOTAL
Church	5	6	10	—	21
Milk Stores	3	3	8	—	14
Supermarkets	—	1	5	—	6
Movies	1	1	6	—	8
Events	2	2	3	—	7
Restaurants	2	2	3	—	7
Self Administered Movie Question- naires	—	—	4	3	7
TOTAL	13	15	39	3	70

1,772 respondents providing input into the behavioural study.² In addition, our behavioural researchers personally interviewed over 100 officials of various organizations, including the clergy, company executives, restaurant managers, theatre managers, milk and grocery store managers and governmental officials. They obtained from these persons invaluable facts and opinions which related their particular organizations to certain aspects of Sunday. Data provided by these persons will appear in subsequent portions of this chapter.

Interview schedules were specially designed for each of the six types of Sunday activities covered in the 63 location interviews. In addition to specific questions directly related to the specific activity in which the respondent was then engaged (i.e., attending church, buying goods from a milk store, buying goods from a grocery store, attending a movie, attending a special sporting or cultural event, or eating at a restaurant), each interview schedule contained the following behavioural question: "What is the meaning of Sunday for you? What does your Sunday usually consist of?" Responses to this question provided much of the data which will appear subsequently in this chapter. A special interview schedule was also designed for the telephone survey, and a questionnaire was drawn up for use by the Famous Players chain at seven of their movie locations.

In order to present the data collected in a meaningful form, our behavioural researchers developed a theoretical research framework consisting of five categories of Sunday behaviour:

1. socio-cultural institutions;
2. exchange of goods and services;
3. entertainment;
4. transportation; and
5. socio-environmental indicators.

²

SUMMARY OF INTERVIEWS AND QUESTIONNAIRES

	<u>Goderich</u>	<u>Peterborough</u>	<u>Toronto</u>	<u>Other</u>	<u>TOTAL</u>
Telephone Survey	45	98	216	—	359
Personal Interviews:					
Church	82	99	124	—	305
Events	19	20	47	—	86
Grocery Stores	—	16	95	—	111
Milk Stores	20	33	170	—	223
Movies	14	21	85	—	120
Restaurants	18	8	38	—	64
	<u>153</u>	<u>197</u>	<u>559</u>	<u>—</u>	<u>909</u>
Self Administered:					
Movies	—	—	341	163	504
GRAND TOTAL	<u>198</u>	<u>295</u>	<u>1,116</u>	<u>163</u>	<u>1,772</u>

In the category of socio-cultural institutions are included churches and voluntary associations. Some difficulty was experienced in obtaining church attendance statistics because many denominations did not appear to record church attendance, while the records of others were incomplete. However, data were obtained from the Anglican and Roman Catholic Churches, and they appear subsequently.

In the second category, exchange of goods and services, information was obtained from one of the large chains of stores, including daily sales records and sales tapes from selected stores; also, information was obtained from selected gasoline service stations and restaurant managers.

In the third category, entertainment, access was obtained from the Bureau of Broadcast Measurement to their 1969 radio and television surveys in order to gain some understanding of patterns of media use. Also, two theatre chains, Odeon Theatres (Canada) Ltd. and Famous Players Canadian Corporation Ltd., cooperated in allowing the selection of a cross-section of their theatres and the computation of Sunday and weekly attendance figures in order to gain an understanding of movie-going patterns as they relate to Sundays. The Royal Ontario Museum and the Ontario Science Centre provided statistics as well.

In the fourth area, transportation, statistics were obtained from Gray Coach Lines concerning bus traffic. However it was impossible to secure data for aeroplane or railway passengers. The Toronto Transit Commission (the only public transit system operative on Sunday in the three test communities) provided useful data. The Ontario Department of Highways assisted in site location studies to determine highway use.

In the fifth category, socio-environmental indicators, our researchers sought out statistics on crime, motor vehicle accidents, water pollution, air pollution, noise pollution, and utilization of the telephone. Data were received from the Metropolitan Toronto Police Department, the Ontario Department of Highways, the Air Management Branch of the Ontario Department of Energy and Resources Management, and Noise Control Consulting Services. In addition, interviews were held with officials from the Ontario Water Resources Commission and with the Bell Telephone Company of Canada, although these latter two organizations did not have available statistics respecting the use of facilities on Sundays.

Finally, to complete the description of the methodology, the telephone survey, on-site interviews and self-administered movie questionnaires were all conducted during the months of February, March and April, 1970.

1. *Socio-Cultural Institutions*

(a) The Churches

Much has been written recently concerning the trend towards secularization in North American society in the past decade. Whereas

the fifties were marked by a mild religious revival, the sixties saw a movement away from active involvement in church activities, particularly by younger people born in the post-war era.

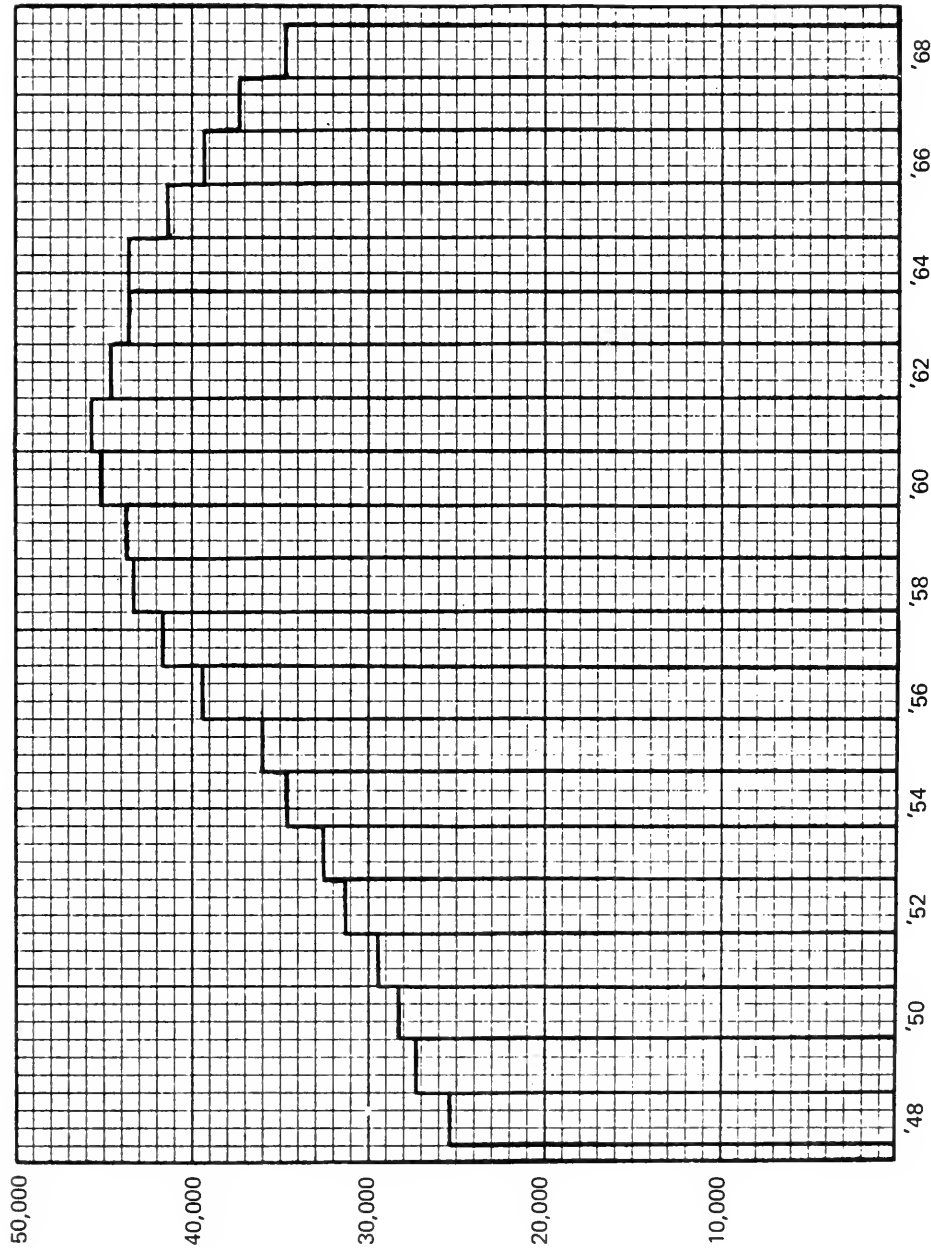
In order to explore the nature and extent of this trend in Ontario, our researchers, in addition to the telephone survey and to 305 interviews conducted at church sites in Goderich, Peterborough and Toronto, visited the Toronto headquarters of several denominations and the ministers in a number of churches in the three test communities to ascertain their views concerning Sunday attendance at church services and other church-related activities.

All of the Protestant officials interviewed in the three communities, including the Toronto headquarters, agreed that there had been a general decline in attendance during the sixties, although there are of course exceptions in individual churches depending on leadership from the pulpit and the morale of the congregation. This decline seems to have been particularly marked two to three years ago (1967-68), and our researchers found a consensus that a slight but definite revival in attendance at Sunday worship services had taken place in 1969. The Roman Catholic officials did not report a similar trend in their churches, since attendance has increased. However, the increase has not always been in proportion to the increase in numbers of persons of the Roman Catholic faith in a given area.

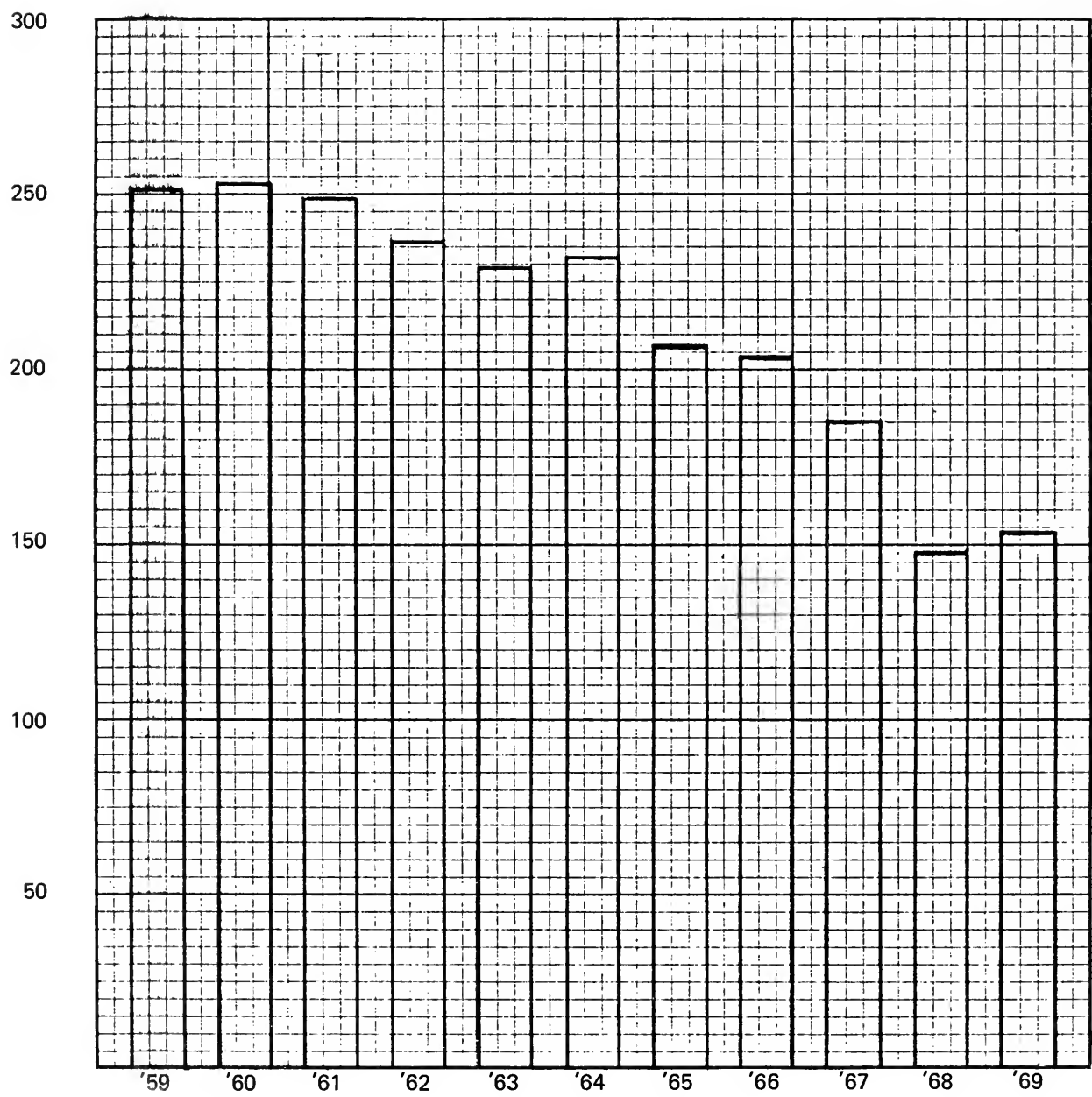
Our behavioural researchers attempted to secure statistical data on church attendance. A number of the larger churches in Ontario made data available but it was either incomplete or not comparable on a year by year basis. However, the Anglican Church provided attendance figures for the Diocese of Toronto for the years 1948 to 1968 inclusive (this Diocese includes the counties of York, Peel, Simcoe, Ontario, Durham, Northumberland, Peterborough, Haliburton and Victoria). Attendance figures were also provided by the Goderich Anglican church for the years 1959-1969. The Roman Catholic Church in Metropolitan Toronto (for the years 1961-67) and in Peterborough (1960-69) also provided statistics for comparative purposes.

The following bar graphs demonstrate, for the Anglican Diocese of Toronto and the Anglican church in Goderich, the rise in church attendance during the 1950's and the subsequent decline in the 1960's.

AVERAGE SUNDAY MORNING ATTENDANCE
IN ANGLICAN DIOCESE OF TORONTO 1948-1968



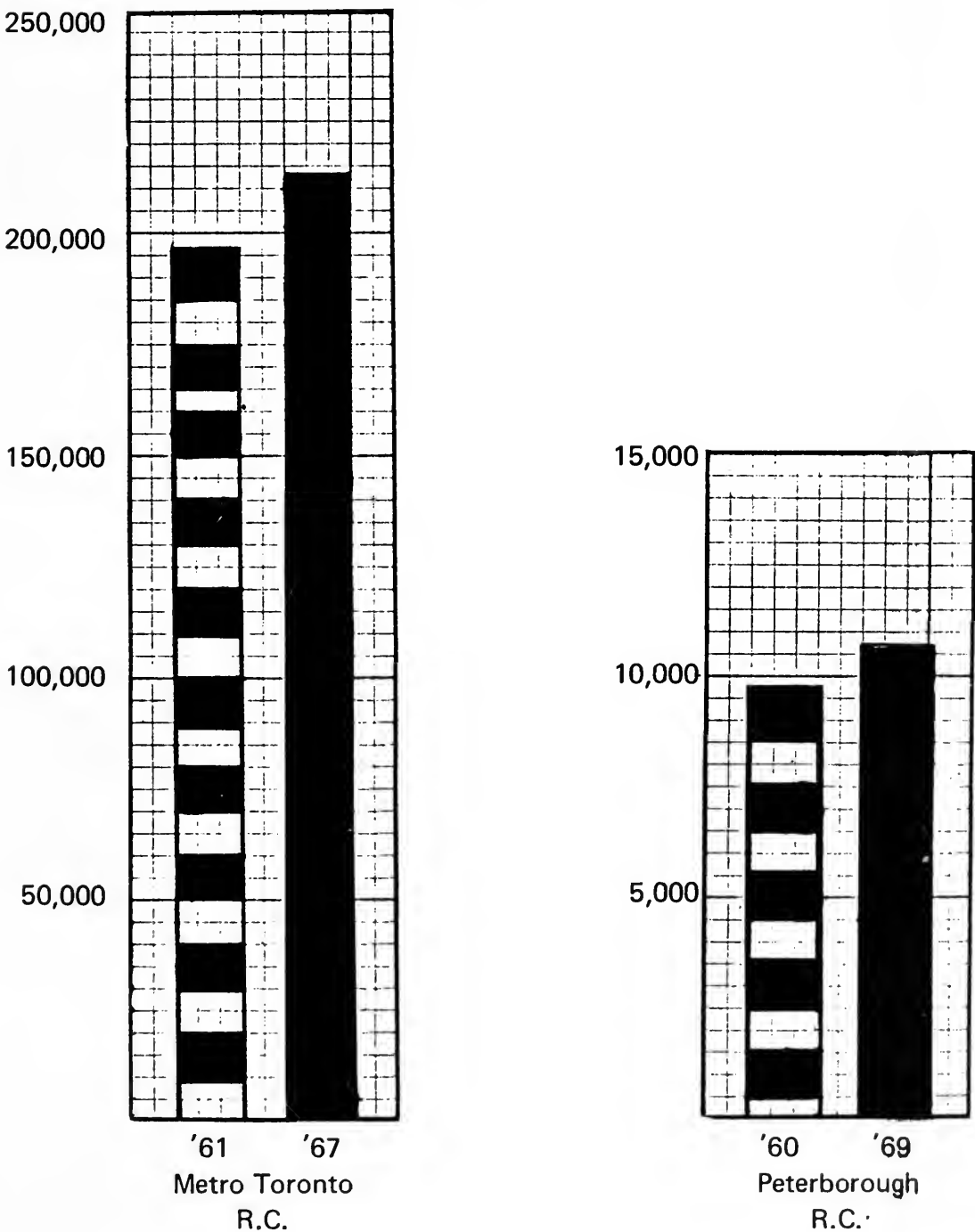
AVERAGE SUNDAY ATTENDANCE
IN GODERICH ANGLICAN CHURCH 1959-1969



The fact that the Anglican Diocese of Toronto includes both urban and rural areas and that the Goderich Anglican church draws from both rural and small town areas lends support to the conclusion that these figures might well represent an Ontario-wide pattern in communities of all sizes. Whether or not these conclusions can be inferred for all major Protestant religious denominations is certainly problematic.

The following bar graph indicates that in the Roman Catholic churches in Toronto and Peterborough Sunday attendance is increasing.

AVERAGE SUNDAY ATTENDANCE AT METRO TORONTO
ROMAN CATHOLIC CHURCHES AND
PETERBOROUGH ROMAN CATHOLIC CHURCHES



However, it must be noted that while there is a slight increase in average Sunday attendance in the Toronto and Peterborough Roman Catholic churches, the percentage increase lags behind the general population increase in the period from 1960-69 which is about thirty per cent. In Metropolitan Toronto, the percentage increase of Roman Catholics would probably be considerably greater than the population increase as a result of immigration of persons from Central European countries, most of whom are members of the Roman Catholic faith. Therefore, it can be concluded that in both the Roman Catholic and Protestant churches, a lesser proportion of the total population in those areas surveyed attended church on Sundays in the sixties as compared with the fifties.

A 1969 report prepared by P. S. Ross & Partners, Management Consultants, for the Presbyterian Church in Canada contains evidence of declining church membership in the Presbyterian, United, Anglican and Baptist Churches in the latter part of the sixties:

The Presbyterian Church in Canada had 194,444 communicants on its rolls as of December 31, 1968. This is a decrease of 3,428 from 197,872 communicants a year earlier. . . . It should be noted that membership increased sharply during the 1950's then more slowly during the early 1960's, reaching a plateau from 1963 to 1965. A rather sharp and slightly accelerating decline in communicant roll numbers commenced after 1965. . . .

The Presbyterian, United and Anglican Churches all experienced substantial growth of membership (i.e., confirmed communicant members) from 1956 through to 1964. These three denominations plus the Baptist Convention of Ontario and Quebec have all declined, some denominations sharply, from 1965 to the present.³

The above statistics and trends were borne out by candid comments made by a number of church officials interviewed by our behavioural researchers. One minister stated that each fall the return to church, after the summer holidays, was not as large as the year before, and attributed this decline to a growing tendency to travel. A minister in Peterborough felt that the growing popularity of snowmobiling and skiing was noticeably detrimental to Sunday church attendance. The Roman Catholic cathedral in Peterborough has tried to meet the problem of attendance by holding services at times convenient to parishioners, and our researchers advised that the 4.30 p.m. mass at the cathedral in Peterborough was attended by many younger persons who had spent the day engaged in recreational pursuits.

³Ministry of the Presbyterian Church in Canada (October, 1969), pp. 2, 4. This is a report on a program of research and development for the Presbyterian Church in Canada relating to pastoral and other ministries in the changing context of the Presbyterian Church in Canada. It was conducted by P. S. Ross & Partners in cooperation with the Committee on Recruitment and Vocation of the Presbyterian Church in Canada.

The behaviour of younger persons between ages 16 and 25 respecting church attendance was a particular concern of our researchers. Public comment in the press has been most pointed concerning the decline in church attendance by this group. The popularly held view is that young people "in the good old days" were regular and conscientious church goers, in marked contrast to today's youth. Our researchers found this conception was disputed by senior church officials of two denominations. One said that he was very cynical about youth in the good old days: "Youth back then were praised for going to church, but really they went to see the girls home." He added that one must also understand that the church at that time was the only source of intellectual and social stimulus in the community. An official of another denomination seemed to concur, stating: "We went to church in the twenties and the thirties because we had nothing else to do."

In our researchers' interviews with members of the clergy, they discovered a broad spectrum of attitudes, ranging from the minister who found "young people absolutely turned off" and despaired of any solution, to those who felt that today's young people were no different from those of thirty years ago, to those who felt that young people were rightfully "turned off" by the hypocritical attitude of their elders. Generally, there seemed to be a consensus, as one church official put it, that "parents of teenagers are not sure of themselves; therefore they can't give direction to their children." Many felt that the resulting freedom of young people to choose for themselves whether or not to go to church was probably very good. As a result, one minister said: "Young people who come *are* committed."

The church officials interviewed also reported that involvement in other church-centred activities had been on the decline in the sixties. They said that generally many of the young people's groups in the church were drifting aimlessly, and that apart from Sunday morning worship, church activities in general were not able to attract members of the congregation on a wide scale.

This view was substantiated by a Canada-wide study and opinion survey on United Church Sunday schools conducted by the staff of the United Church Observer in 1970.⁴ The following information was reported:

Last year, the United Church's total enrolment of teachers and pupils was 425,467 — little more than half of the 757,388 enrolment just eight years before, the lowest since church union.

What's more, the rate of decline is increasing. In 1966, we lost six percent. In 1967, seven percent; in 1968, nine percent. In 1969, the loss rose to 12 percent. The statistics show that Sunday schools are on an increasingly steep path to oblivion.

⁴See James Taylor, "What's Happening to our Sunday Schools?" 33 United Church Observer, No. 2 (September 1970), pp. 12-16.

At the present rate few Sunday schools will be able to stay open more than another five years.

The decline isn't likely to ease off. The biggest losses now are coming in the nursery and kindergarten departments, not among the older children, as the pattern used to be.

The same report indicated that Sunday school attendance in the Anglican Church had dropped from 312,000 pupils in 1958 to 176,000 in 1968, and that the Presbyterians had gone from 122,000 to 97,000 since 1961. Of those 210 respondents from across the country replying to the survey questionnaire, 139 or 66.2% attributed the attendance decline to "too much else to do on Sundays". The only other reason put forward by the majority (162 or 77.1%) was "lack of interest by parents". Among various methods suggested for reviving church schools was "to try some day other than Sunday" (this ranked second with the under-age 50 respondents).

The telephone survey and the 305 on-site interviews conducted at churches in the three test communities were very revealing concerning both a comparison of trends between urban and rural areas respecting church attendance and type of activities in which those who actually attended church are most likely to engage on Sundays. First and foremost was the conclusion that there is an inverse relationship between the size of the community and the percentage of those who attend church. On the telephone survey, Goderich, the smallest and most rural of the three communities, had the highest rate of church attendance (58%), Peterborough was in the middle (40%), while Toronto, the largest and most cosmopolitan of the communities, had the lowest rate of attendance (25%). Thus it seems clear that in the more rural and less secularized communities such as Goderich, the church plays a more important role in the life of the community, as compared with the city.

It is useful for comparative purposes on a province-wide basis to consider the results of the survey conducted by our attitudinal researchers (referred to in the previous chapter) involving 502 personal interviews scientifically selected from across Ontario (weighted and adjusted by age, sex and city size according to Dominion Bureau of Statistics census data to bring it in line with the total Ontario population 18 and over). One question on that survey inquired as to the frequency of church attendance over the past year. The following results were reported:

Church Attendance In The Past

Eight Weeks: 502 Respondents

From Across Ontario

Seven or more times	33%
Five or six times	5%
Three or four times	6%
One or two times	13%

Five or more times in the past year	7%
Three or four times in the past year	3%
One or two times in the past year	7%
No times in the past year	25%
Refused	1%
Don't know	—
	<hr/> 100%

If one can assume that all those attending church three or more times in eight weeks are "regular church attenders", then 44% of the sample would fit within this category, a figure which is consistent with the results of the telephone survey (58% for Goderich; 40% for Peterborough; 25% for Toronto) projected on a province-wide basis. The other significant fact reported in this area was that one quarter of the sample did not attend church at all. Because of the high probability factor resulting from the methods by which respondents were selected in this attitudinal survey, it would appear that these figures are an accurate reflection of church attendance throughout the entire Ontario population.

The telephone survey conducted by our behavioural researchers also revealed that church-going was primarily a family activity. Over three-quarters of the respondents who had attended church the previous Sunday in all three communities did so with their families (Goderich 78%, Peterborough 98%, Toronto 82%). Most of the remainder attended with their friends.

Consistent with the comments of ministers and priests respecting the trend of non-involvement in other church activities apart from Sunday worship services, the telephone survey revealed that less than 10% in all three communities were involved in other religious organizations, such as youth and women's church groups. Again, the highest percentage (9%) was in Goderich, with the lowest percentage in Toronto (4%), and with Peterborough falling between the two.

The 305 on-site interviews conducted at churches in the three test communities were revealing as to the nature of Sunday for that church-going segment of the population. Understandably, church attendance was one of the principal foci for their Sunday, and they valued Sunday as a religious day more so than persons interviewed at other site locations. Indeed, their leisure activities such as relaxing, visiting with friends and relatives, and spending time with family were seen as appropriate and consistent with the religious significance of the day. These activities rated considerably higher than other activities such as going for a drive, work and work-related activities, sports, recreation, and walking.

The 305 persons interviewed at church sites in the three test communities were distributed between 21 different church locations: eight United, five Roman Catholic, five Anglican and three Presbyterian. The churches were selected to obtain a representative cross-section on the basis of the following criteria: size of denomination, geographical distribution, social composition, and distance from the centre of the city.

Generally, there appeared to be more middle-aged and elderly persons present at most of the church sites than younger persons. The vast majority of those interviewed at the sites reported that they attended church on Sunday at least twice or more a month. And in spite of the lower attendance rates in the city, those who did attend (represented by those who were interviewed), did so as regularly as did those in the small city or the town. Attendance rates for Roman Catholic churches were generally higher than for Protestant churches. Among the various Protestant churches, there was no systematic trend between the denominations. Most people interviewed gave illness as a reason for not attending church, while some few persons mentioned work, sleeping in, visiting, recreation, the weather, or being out of town as reasons for not attending church every Sunday.

When asked if their Sunday church attendance would be affected by an open Sunday, an average of 90% of the 305 persons in the three test communities answered No. Only 8% in Goderich, 11% in Peterborough and 10% in Toronto answered Yes. There was a slightly greater tendency for Roman Catholics, as compared with Protestants, to maintain that their Sunday church attendance would not be affected by an open Sunday.

(b) Voluntary Associations

A sample of service clubs, veterans' associations, ethnic clubs and social clubs were selected to find out their practices respecting meetings and events on Sundays. It was discovered that, overall, very few organizations had active programmes on Sundays. Several veterans' clubs stated that they were closed because of the liquor laws, but most felt that they would be closed even if these laws were to be changed to allow the sale of alcoholic beverages on Sundays.

Among service clubs, the only programmes that were likely to involve members on Sunday were such activities as driving senior citizens to church and sponsoring children's hockey or other games. Among ethnic clubs, our researchers found that Sunday was a relatively busy day for many, with social, cultural and sporting events being regularly scheduled. One director of such a club stated, "Our people work the rest of the week, so Sunday is often the only free day when we can all meet."

None of the clubs surveyed were engaged in business or major projects on Sunday. Most activities at clubs which were open were primarily of a recreational or social nature.

2. *Exchange of Goods and Services*

The telephone survey indicated that there were distinct differences in the Sunday shopping habits of residents of the three test communities. Far more people in Peterborough engaged in Sunday shopping than in Toronto or Goderich (Peterborough, 29%, Toronto, 19%, and Goderich 4%). In addition, the majority of those in Peterborough did so in the company of their families while the majority of the Sunday shoppers in Toronto and Goderich engaged in this activity alone. Also, the majority of those who went shopping on Sunday in Peterborough spent an average of twice the time (around 30 minutes average), as compared with the less than 15 minute average time spent in Toronto and Goderich. From this it may be concluded that the shoppers in Toronto and Goderich were shopping for immediate necessities like milk, bread, cigarettes, etc., while in Peterborough they were shopping on a weekly or semi-weekly basis.

There are two primary reasons for this difference in Sunday shopping behaviour between Peterborough and the other two communities. First, in Peterborough there is a large concentrated shopping area, the Brookdale Plaza, which is open on Sunday, and which openly promotes Sunday shopping. In Toronto, while there are some large supermarkets open, they tend to be localized and are not known and patronized on a city-wide scale as in Peterborough. The shopping pattern in Goderich can quite simply be explained by the fact that all stores, except for the jug milk stores, are closed on Sundays, thereby limiting the range of possible articles which can be purchased.

Four specific types of Sunday shopping in each of the three test communities were examined. The results follow.

(a) *Jug Milk Stores*

Both the Becker Milk Company Limited and Mac's Milk Limited indicated in their submissions to us that approximately 20% of their total sales occurred on Sunday, and that it is clearly the busiest day of the week. Our behavioural researchers undertook to ascertain whether specific jug milk stores in different areas might vary considerably from the overall average, or whether seasonality might affect the percentage of Sunday sales. They selected nine Mac's Milk stores, eight located in Metro Toronto and one located in Peterborough, as representative of the broad range of neighbourhood types serviced by these stores, ranging from density high-rise apartment areas, to high ethnic concentration areas, to suburbia, to exurbia, to Peterborough. The results showed an amazing uniformity of the pattern of Sunday sales as a percent of weekly sales. Irrespective of the nature of the stores' clientele in terms of socio-economic background, ethnic composition, proximity to the city core, etc., or the season, the percentage weekly sales on Sunday consistently hovered about the 20% mark; the lowest was 17.9% at one store in January and the highest was 25.6% in April. The Peterborough store conformed to the pattern in Metro-

politan Toronto. Therefore, it may be concluded that business in these types of stores on Sundays is firmly established in each of the areas in Ontario where they have opened up.

We also sought to determine the average amount of sales on Sunday. In their submissions to us, Mac's Milk Limited had stated that their average sale per customer was \$2.20 on Sundays, while the Becker Milk Company had stated that their average sale was under \$1. Our researchers requested and obtained access to the sales tapes of seven of the Toronto convenience and jug milk stores for a typical spring Sunday and were able to conclude that for all seven stores at least 80% of all Sunday sales were for items that totalled less than \$2. In fact, in all but one of these seven stores, a majority of the sales were for items totalling amounts under \$1.

In comparing the size of purchases between the seven stores, the two stores in the core area located in or bordering on high-rise apartment complexes consistently recorded a higher percentage of purchases in amounts in excess of \$2, while the suburban stores had purchases for lesser amounts. It is difficult to draw specific inferences from this, except to suggest that those living in city core areas tend to rely on these types of stores for general food shopping to a much greater extent than the suburban patron who tends to purchase small single items, like a package of cigarettes or a jug of milk.

On-site interviews with 223 people were conducted at jug milk stores in the three test communities, three stores in Goderich (the only ones open), three in Peterborough and eight in Toronto. The questions put to respondents included the following areas:

- (i) age and sex;
- (ii) social context (whether alone, or with family or friends);
- (iii) articles purchased and amount spent;
- (iv) how often they shop at that store on Sundays and during the rest of the week;
- (v) what they would like to purchase that is not now sold on Sunday;
- (vi) how long they took to get to the store, and by what mode of transportation;
- (vii) the importance or significance of Sunday to them, including their usual Sunday activities.

The majority of those interviewed at the jug milk stores in the three test communities tended to fall in the 16 to 40 age bracket. The Toronto sample tended to be slightly younger than that of the other two communities. More males were interviewed than females, particularly in Goderich. Most of the persons interviewed at these stores in Goderich and Toronto were alone (Toronto 75%, Goderich 47%), while the tendency of those in Peterborough was to be accompanied by their family (47%), and less than one third (31%) were alone.

Milk was the most frequently purchased item in Peterborough and Toronto (Peterborough 37%, Toronto 22%) with cigarettes a close second (Peterborough 20%, Toronto 19%). In Goderich, groceries (28%) led cigarettes and candies (both 20%) in popularity, which might be explained by the fact that Goderich has no grocery stores open on Sundays, unlike Peterborough and Toronto. In Peterborough and Toronto, candies and groceries ranked third and fourth respectively. Meat and home care products were the least purchased in all three communities on Sundays.

These figures would appear to be reasonably consistent with those provided by Mac's Milk Limited and the Becker Milk Company Limited in the public hearings. For example, Mac's Milk gave the following product breakdown for its Toronto area stores for the period September 15–October 12, 1969: dairy products — 27.2%; tobacco — 26.7%; groceries — 18.7%; bakery products — 9.2%; soft drinks — 6%; candy — 4.3%; with the balance of 6.9% made up of drugs and cosmetics, produce and sundries.

A comparison of the stores in Metropolitan Toronto led to the conclusion that groceries ranked higher in those stores in the core areas which were part of or bordered on high-rise apartment complexes, and ranked lower in the suburban stores. Milk sales appeared to be fairly consistent among the Toronto stores (around 25%), although in the one store with the highest proportion of groceries, the proportion of milk was the lowest (14%).

With regard to the total amount spent by each person, the interviews were consistent with the statistics taken from the tapes of the seven selected Mac's Milk stores in Toronto: i.e., in all communities, over 80% of the persons were purchasing items totalling less than \$2. The majority of the respondents at the jug milk store sites in all three communities stated that they visited that particular store at least twice a month on Sunday (Goderich 90%, Peterborough 78%, Toronto 87%) and four or more times per month during the rest of the week. Therefore, the jug milk stores would appear to have secured regular customers, not only on Sundays, but throughout the week as well. For the majority, it was only a five minute drive from their homes to the jug milk store. In only one Toronto store at which on-site interviews were conducted was there any significant utilization of public transit facilities, this being a suburban milk store.

As for desired items that could not be obtained in these stores, the vast majority in all three communities replied that there were no items that they desired to purchase on Sundays that were not at present available in these stores. Among the minority who said there were items they desired and could not purchase (19% in Goderich, 12% in Peterborough and 25% in Toronto), the most frequently mentioned items were liquor (10% in Goderich and 7% in Toronto), followed by drugs (4.5% in Goderich, 4% in Peterborough and 1% in Toronto) and fresh meat and vegetables (4% in Peterborough and 6% in Toronto).

(b) Supermarkets

Besides the various jug milk stores open on Sundays in the three test communities, two of the communities — Peterborough and Toronto — have food supermarkets open on Sunday. These stores have a far greater range and variety of both food and non-food items than do the jug milk stores, and are in most cases distinguishable by a number of economic criteria discussed in a previous chapter, including a greater variety of food and non-food items, much larger floor space and display areas, and a much higher average purchase per customer. Peterborough has one such supermarket, Sunnybrook Discount Food Market, located in the Brookdale Shopping Plaza in the centre of the city. This store, together with five other supermarkets in Metropolitan Toronto open on Sunday (selected on the basis of geographic distribution and nature of clientele) were the objects of customer behavioural study. The five Toronto stores included the Dixie Fruit Market in Mississauga, Knob Hill Farms in the north end of Toronto, Food City in the suburban east end of Toronto, Sunnybrook Market in the same suburban east end, and Sunnybrook Discount Food Market in the suburban west end of Toronto. There are no food supermarkets open in Goderich on Sunday, so that community was not included in this aspect of the behavioural study.

A substantial majority of those interviewed at supermarkets in Toronto and Peterborough were under the age of 40, and those in Peterborough tended to be slightly younger than those in Toronto. A significant majority of those interviewed in the Toronto stores were female, while the majority of those interviewed in Peterborough were male.

Our researchers' survey revealed that more people tended to shop alone in the Peterborough store than in the combined Toronto stores (Peterborough 50%, Toronto 37%). In most other cases (Peterborough 37%, Toronto 52%) persons shopping were with members of their family. The family pattern of supermarket shopping in Toronto (52%) was particularly noticeable when compared with shopping in jug milk stores where 75% of the persons were shopping alone and only 14% were with their families, thus leading to the conclusion that Sunday grocery shopping in a supermarket tends to be more of a family outing rather than merely picking up necessities alone. This conclusion was confirmed through a spot check taken by our researchers at four of the Toronto supermarkets for three 15 minute periods during a Sunday afternoon in which everyone entering the store was characterized as being either alone, with another adult, or with children, or with the spouse and children. The following were the results:

OBSERVED SOCIAL CONTEXT — SUPERMARKETS

STORE	Alone	2 Adults	1 Adult & Children	Mother & Father & Children	Total
B	37	31	14	18	100%
C	55	22	15	7	99%
D	45	27	18	10	100%
E	69	20	9	2	100%

It is significant that the store furthest from the core of the city was store B, the one at which more *groups* of people were observed — thus again suggesting that because of distance and location this store tends to be one where people take along members of their family or friends as a form of outing.

As for the articles purchased in these stores in Peterborough and Toronto, general groceries accounted for the highest percentage in all of them (Peterborough 41%, the five Toronto stores ranging from 22–41%). Milk ranked a distant second in four of the six stores, generally followed by bread and meat respectively. Candy, cigarettes and home care products accounted for a relatively small percentage (3–11% range) of total Sunday sales.

The average amount spent in supermarkets per customer greatly exceeded that spent in the jug milk stores. Whereas over 80% of total sales in jug milk stores were under \$2, some 80% of total sales in Toronto and Peterborough supermarkets on Sundays fell in the \$2–\$10 range. Indeed, the average sale in the Toronto supermarkets fell in the \$5–\$10 range, with 71% of sales in the Dixie Fruit Market in Mississauga and 79% in the Knob Hill Farms store in north Toronto falling into the \$5–\$10 range.

At least one third of the customers interviewed in the Peterborough and Toronto supermarkets on Sundays (Peterborough 37%, Toronto 40%) stated that they visited the supermarket on Sundays at least twice a month. The balance was split evenly between those visiting the supermarket once or twice, and those less than once a month. Thus it can be concluded that these supermarkets are visited less frequently per month than the jug milk stores. What is perhaps more significant was that almost half of those shopping on Sunday in the Toronto supermarkets never visit those stores during the rest of the week (44%), while in Peterborough it was a little better than a quarter (27%). The balance of those interviewed was divided in the frequency of their shopping trips throughout the week, with the majority visiting the supermarket between four and ten times per month on other days of the week. These figures led our researchers to hypothesize that many of the Sunday customers and the weekday customers, particularly in Toronto, are mutually exclusive groups, and that Sunday shopping for groceries has become an entrenched habit for a significant number of people. Our researchers also hypothesized from the data collected that the

Sunday shoppers who take the longest time to reach the supermarket, generally because of distance, are the ones who most often use the store's facilities only on Sunday. This is based on the finding that in the two supermarkets outside the Metropolitan Toronto boundaries (which 54% and 87% respectively of the customers visited only on Sundays), a concomitantly high percentage (27% and 60% respectively) took over 15 minutes to travel to the store.

Our researchers asked the respondents at the five Metropolitan Toronto supermarkets open on Sundays where they had come from and where they intended to go after they left the store. This was to determine whether or not this Sunday shopping was part of a series of family activities using the automobile that day, or an isolated event. The data indicated that 96% of the shoppers interviewed had come from home, and 91% intended to return directly home. Thus it may be concluded that Sunday shopping in the supermarkets is *not* part of the complex of Sunday activities, but a specific isolated activity in itself.

Finally, our researchers asked respondents in two of the Toronto supermarkets if they thought it was important that food supermarkets be open on Sundays. 73% answered in the affirmative but significantly, 27% (more than one quarter) of those using the supermarket on Sunday did not consider it important that such stores be open. Indeed, some respondents opposed on moral grounds the stores being open.

(c) Restaurants

All three test communities have a number of restaurants available for Sunday dining, ranging from the more expensive dining facilities to the drive-in and take-out services. While the Canadian Restaurant Association was unable to provide overall statistics as to the use of restaurant facilities on Sundays as compared with other days of the week, the telephone survey conducted in the three communities did provide some insight into the percentage of people who utilize restaurants on Sundays. Goderich ranked the highest at 22%, followed by Peterborough with 12% and Toronto 8%. The high percentage in the case of Goderich might be explained by the fact that many people in this town travel to the neighbouring cities of London and Stratford for certain socio-cultural or entertainment activities and such a trip usually involves a meal away from home. The great majority of those surveyed in Goderich and Peterborough eating in restaurants on Sunday did so with their family (Goderich 60%, and Peterborough 76%), while those from Toronto tended more to be with their friends (59% with friends, 35% with family and 6% alone). Our researchers concluded that in the small communities, dining out on Sundays is a more popular Sunday family activity than it is in the urban metropolis.

Behavioural on-site interviews of persons using restaurant facilities presented certain difficulties, but nevertheless, a total of 64 people in the three test communities were observed and interviewed. Generally, those interviewed tended to be middle-aged or younger. Consistent with the telephone survey, the majority of those in Goderich and

Peterborough tended to be with their families, whereas in Toronto the tendency was to be with friends. Most of the respondents reported that they ate out at least once a month on Sunday with a significant minority saying that they did so more than twice a month.

Several reasons were given for dining out on Sunday, the most frequently mentioned being: "to give the wife a rest", "tired of cooking", "a change". For most, this activity was generally seen as a very pleasant change from the weekday routine — an occasion when family or friends can get together and dine in a relaxed setting. Most people did not travel long distances to reach the restaurants, and those who did used their automobiles.

(d) Gasoline Stations

Our researchers conducted limited behavioural studies of gasoline station use by examining Sunday purchases of gasoline at select stations, as a percentage of the total week's sales. Through the cooperation of Imperial Oil Limited, a fairly good indication of overall Sunday sales of gasoline in Metropolitan Toronto was obtained. This company uses a sample of ten stations in the city to project their monthly sales volume (this sample has been found to be within 1% of actual sales). Based on this sample of ten stations, only 7.25% of monthly gasoline sales were made on Sundays between February 3, 1969 and April 13, 1970, thus leading to the conclusion that Sunday sales of gasoline are usually low. However, this result is complicated by the fact that many urban service stations are closed every Sunday or operate on a rotational basis, thus creating negative expectations among customers respecting the purchase of gasoline on Sundays. In addition, the gasoline purchased on Sundays tends to be at highway service station outlets, rather than in the city.

Our researchers also examined a number of service stations which were open on Sundays in Metro Toronto, and found that Sunday sales ranged from 5% to 21% of the total week's sales, depending on location.

3. *Entertainment*

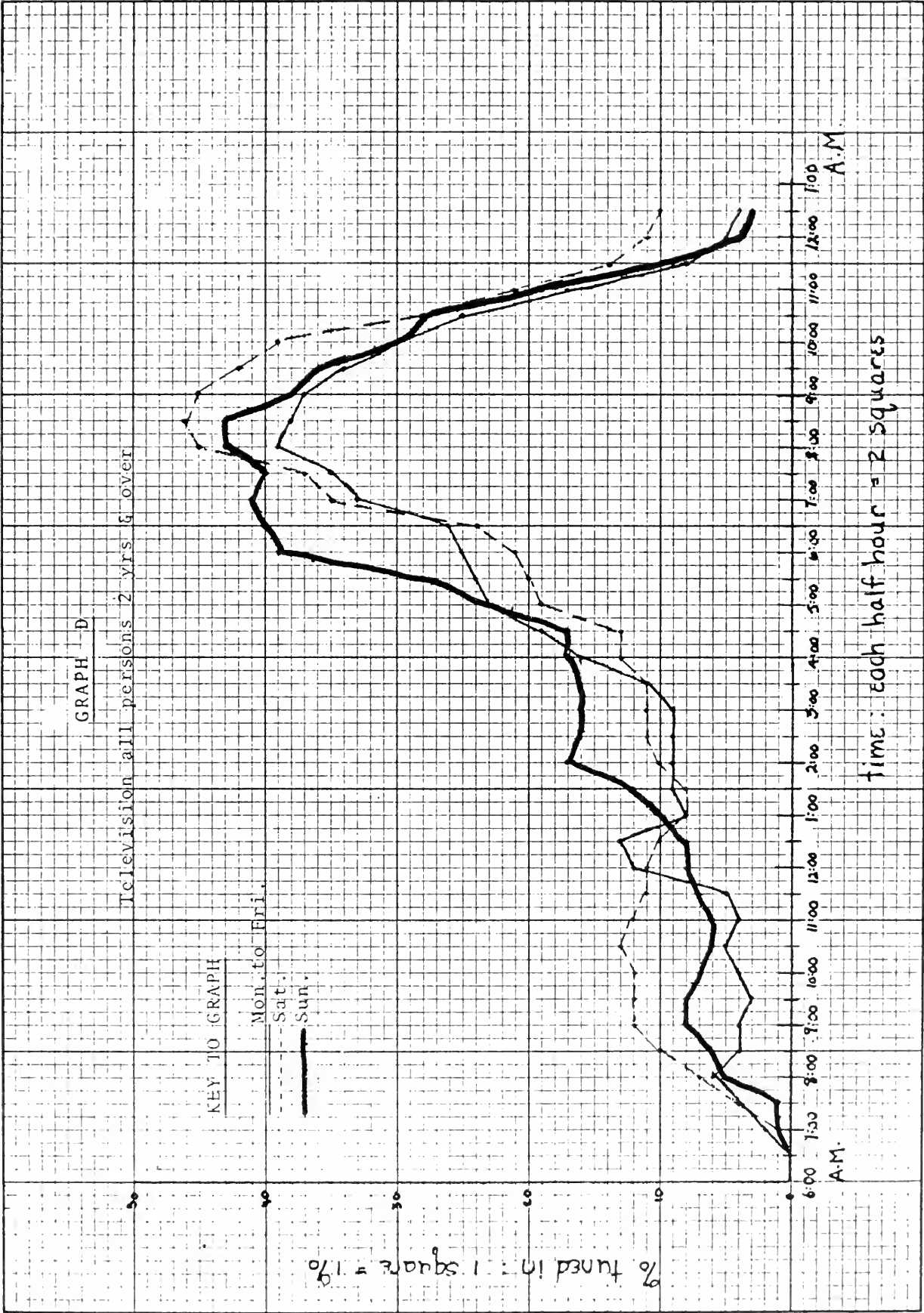
(a) Television and Radio

The telephone survey indicated that the major Sunday activity in all three test communities was watching television. 65% of Toronto respondents stated they watched television for an average of 2.8 hours on the previous Sunday, 67% of Peterborough respondents for an average of 2.3 hours, and 49% of Goderich respondents for an average of 3.3 hours. This ranks as the second most common activity in Peterborough and Toronto, next to household chores (Peterborough 76%, Toronto 67%), although time spent at household chores was considerably less (Peterborough average of 2 hours, Toronto average of 1.75 hours). In Goderich, T.V. ranked second to church attendance (58%), although the time spent watching television (average of 3.25 hours) was more than double the time spent attending church (average 1.25 hours). In all three test communities, the great majority of

those people watching television on Sundays did so with their families (Goderich 70%, Peterborough 82%, Toronto 78%).

Figures were obtained from the Bureau of Broadcast Measurement for television and radio audience patterns in the Province of Ontario. These figures are from a survey conducted by the B.B.M. in November 1969. The following is an analysis from these figures.

A greater percentage of people watch television on Sundays as compared with other days of the week (including Saturdays) at the following times: 1-4 p.m. and 5-8 p.m. If one excludes Saturdays, Sunday outstrips the weekdays at all times except between 12-1 p.m., 4-5 p.m. and 12-1 a.m. The comparative differences between the size of viewing audiences in Ontario are indicated in Graph A following:



Perhaps most significant is the high percentage of television viewing on Sunday evenings, presumably a family activity. However, Sunday evenings between 8 p.m. and 12 a.m. do not rank as high as Saturday evenings, probably because viewers do not have to go to work or school the next morning and can therefore afford to watch television longer and later into Saturday night.

For teenagers between the ages of 12 and 17 years, Sunday outstrips both weekdays and Saturdays between the hours of 2 and 4 p.m. and 6 and 8 p.m. Perhaps more significant for this group is the fact that there is no sharp decline in the numbers watching television between the hours of 5.30 and 6.30 p.m. on Sundays, while such a decline does exist on Saturdays and weekdays. This might indicate one of two things: either that more teenagers eat Sunday supper in front of their television sets, or alternatively they have supper earlier or later than usual on Sundays.

Television viewing rates for children between the ages of 2 and 11 years get as high as 27% on Sunday morning (as compared with 42% on Saturday morning), and up to 52% on Sunday evening (at 6.30 p.m.). These viewing rates are substantially higher than those in the teenager or adult age groups.

Listening to the radio would seem to be another major activity of people in Ontario on Sundays, although not quite as pronounced as watching television. In the telephone survey conducted in the three test communities, 53% of the respondents in Toronto, 43% in Peterborough and 13% in Goderich said that they had listened to the radio the previous Sunday. The average listening time in Toronto was approximately 3 hours, in Peterborough just over 2 hours, and in Goderich about three-quarters of an hour. In Toronto and Peterborough, the great majority (61% and 76% respectively) did so with members of their family, while in Goderich the majority did so alone (60%).

According to the B.B.M. measurements in November, 1969, generally more people watched television than listened to the radio at any particular time on both Sundays and throughout the week.

The only time when Sunday radio listening outstripped Saturdays and weekdays was between 1 and 4 p.m., but even during this period, television rates exceeded radio rates by about 5%. During Sunday evenings, when television rates approached 40% at peak hours, radio listening rates were usually in the vicinity of 5-10%. The highest Sunday radio listening rate was 15%, which was reached at 10 a.m. and also at 12 noon, but from then on it went downhill to a low of 1% at midnight.

Teenagers between age 12 and 17 had a lower Sunday radio listening rate than the total population, and a lower Sunday rate than weekday rates except between 9 a.m.-4 p.m. (school hours), but even then it was less than Saturday rates. The teenagers' Sunday

radio listening rate was higher than Saturday rates only between the hours of 8–10 p.m. (by some 2–3%). The higher weekday listening rates during the evening as compared with Sundays might be attributed to the fact that many persons in this age group do their homework accompanied by the radio.

A very low percentage of children between the ages of 2 and 11 listen to the radio at any time during the week, and Sunday is generally the lowest. Seldom does the rate get above 2% of this age group.

(b) Moving Picture Theatres

Our behavioural researchers found through the telephone survey in the three test communities that a substantially higher percentage of the residents of Goderich go to movies on Sunday than in Peterborough and Toronto (Goderich 9%, Peterborough 1%, Toronto 1%). Further questioning revealed the fact that many Goderich residents attend Sunday movies in nearby urban centres such as Stratford and London. There is only one theatre in Goderich, and many residents combine a Sunday movie with a drive on Sunday in these nearby urban communities.

Perhaps more revealing are statistics by the Odeon and Famous Players theatre chains for a number of theatres across the province, presented in such a way as to make possible a comparison of Saturday and Sunday attendance rates with the weekly rates for the years 1964 and 1969. Also, by having two sample years five years apart, an assessment of the degree of change is made possible. Generally, while attendance rates at movie theatres have declined in the sixties, Sunday attendance as a portion of the total weekly attendance has been increasing.

TRENDS IN ONTARIO THEATRE ATTENDANCE

THEATRE	<u>1964–69</u>				
	A	B	C	D	E
	<u>1964</u>	<u>1969</u>	<u>1964</u>	<u>1969</u>	<u>1964–69</u>
	Sat/ week	Sat/ week	Sun/ week	Sun/ week	Sunday % change
<u>TORONTO</u>					
Baronet	26.5	25.4	25.8	25.1	–32
Carleton	30.4	26.5	15.4	19.2	+51
Don Mills	35.8	33.7	9.9	15.4	–2
Eglinton	27.2	25.9	13.6	19.6	+18
Fairlawn	30.7	33.7	13.6	15.9	–39
Golden Mile	30.9	32.7	13.8	18.8	–12
Hollywood	29.8	27.5	15.3	20.4	–54
Lakeshore	33.1	35.2	16.8	22.6	–2
Nortown	30.6	30.1	18.3	21.2	–9
St. Clair	31.9	28.4	41.7	46.5	+47
Bay Ridges Drive-in	40.9	43.4	13.4	17.2	–37

TRENDS IN ONTARIO THEATRE ATTENDANCE

	1964-69				
	A	B	C	D	E
	1964	1969	1964	1969	1964-69
	Sat/ week	Sat/ week	Sun/ week	Sun/ week	Sunday % change
<u>LARGE COMMUNITIES</u>					
Brantford	31.7	32.4	17.4	15.9	-44
Fort William	28.7	29.9	12.9	22.0	-12
Guelph	38.5	31.4	9.7	14.5	+35
Hamilton	28.9	29.0	19.2	20.0	-42
Kingston	26.5	25.6	12.1	16.3	-13
London	32.3	29.4	12.5	14.1	-14
Niagara Falls	29.7	34.3	14.0	14.6	-27
North Bay (Cap.)	32.1	28.2	14.4	18.8	-6
North Bay (Odeon)	22.1	26.7	13.8	17.5	-38
Oshawa	28.1	28.4	15.8	15.3	-22
Ottawa (Cap.)	29.2	28.4	19.4	17.9	-47
Ottawa (Elmdale)	31.6	27.7	12.5	17.2	-38
Peterborough	36.4	31.6	—	12.9	-17
Sarnia (Cap.)	28.8	28.2	13.6	15.3	+3
Sarnia (Odeon)	28.6	30.1	10.6	16.0	-18
Sault Ste. Marie	31.2	23.8	15.5	15.9	-24
<u>SMALL COMMUNITIES</u>					
Barrie	30.5	29.4	14.8	13.9	-32
Brockville	25.8	25.6	15.8	18.7	-17
Midland	33.5	31.8	10.1	12.8	-19
St. Thomas	33.7	34.3	13.6	15.4	-27

In comparing columns A with C and B with D, we can see that for both years Saturday drew almost double the total weekly percentage than did Sunday. However, in most theatres Sunday had a higher attendance rate than the daily average which was approximately 14%, and this applied for theatres in each of the three categories of communities. In comparing columns C and D, it will be noted that there was a tendency for Sunday to have a higher percentage of the total weekly attendance in 1969 than in 1964, for theatres and communities of all sizes. But column E puts this in perspective by demonstrating that absolute attendance between 1964 and 1969 did not increase, but had in fact decreased. However, Sunday attendance did not decrease as rapidly as attendance on the other days of the week.

Our behavioural researchers carried out a total of 120 on-site interviews at nine theatres in the three test communities, and were able to augment data received from these interviews with the 504 questionnaires administered in the seven theatres by the Famous Players chain (four theatres in Toronto, and one in each of Burlington, Hamilton and Ottawa).

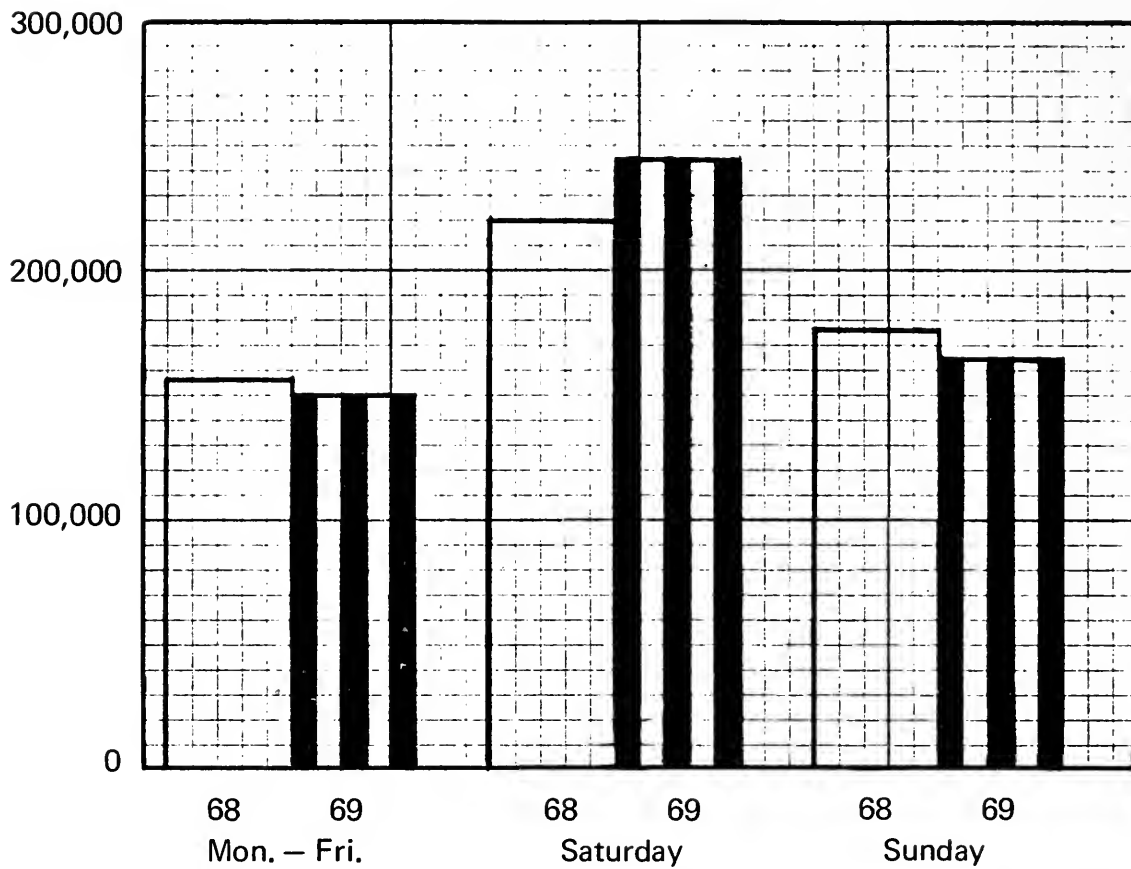
Approximately two-thirds of those interviewed in the theatres on Sunday afternoons were under age 40, and over 90% of those who completed the Famous Players questionnaire were under age 40. Both groups were evenly split between males and females. The great majority of persons interviewed in all theatres came with family or friends. The only theatres in which a sizable minority attended alone were the St. Clair theatre in Toronto, which shows Italian movies, and a Metro Toronto core theatre which draws a high proportion of young single persons. More of the people interviewed in Goderich and Peterborough were accompanied by friends (Goderich 57%, Peterborough 91%), while in Toronto, equally large percentages were accompanied by either family (42%) or friends (40%). Most people interviewed attended the theatre on an average of once or twice a month on Sundays, and a consistent 14% in all three test communities attended more than twice a month. The only theatre where a majority attended movies more than twice a month was the Toronto St. Clair theatre which shows Italian movies. It seems that this theatre's clientele is comprised of a devoted group of regular Sunday patrons and that these people do not attend films very often during the rest of the week — most of them less than once or twice a month on a weekday.

(c) Fairs and Exhibitions

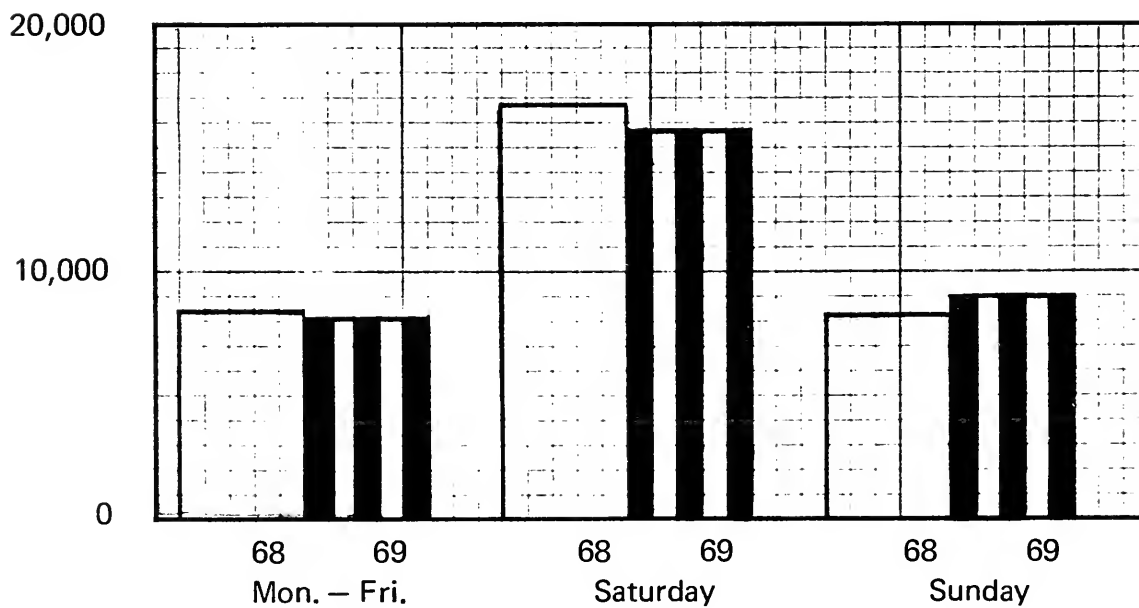
As of May 31, 1968, Ontario municipalities were enabled to grant authority by bylaw to fairs and exhibitions to operate on Sundays. While a fairly large number of municipalities throughout the province took advantage of these new powers, primary attention was focussed on Sunday attendance statistics for three of the better known fairs and exhibitions in the province: the Canadian National Exhibition, the Royal Agricultural Winter Fair, and the Western Fair (London). These three events were chosen not only because of their large attendance by persons from all parts of the province, but also because each of them was open for at least one Sunday in both the years 1968 and 1969.

The attendance statistics for the three fairs and exhibitions studied are given below in bar graph form for the years 1968 and 1969, and comparative statistics for Saturdays and Monday to Friday averages are also given to enable comparisons:

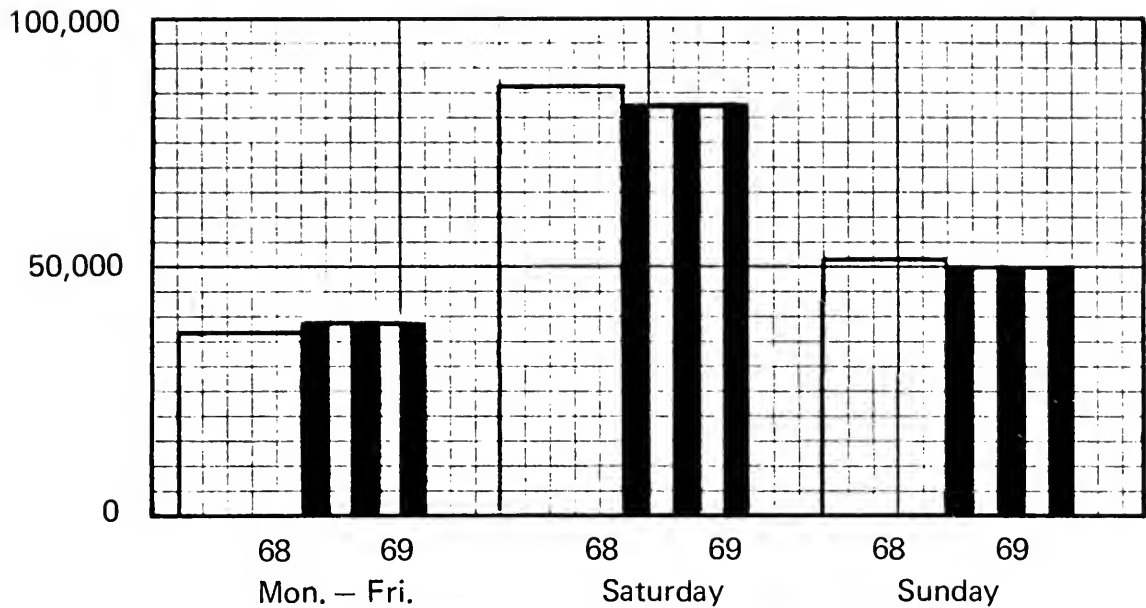
CANADIAN NATIONAL EXHIBITION AVERAGE ATTENDANCE
Monday-Friday, Saturday & Sunday 1968 & 1969



THE ROYAL AGRICULTURAL WINTER FAIR AVERAGE ATTENDANCE
Monday-Friday, Saturday & Sunday 1968 & 1969
(Adults & Students, Children Omitted)



THE WESTERN FAIR (LONDON) AVERAGE ATTENDANCE
Monday–Friday, Saturday & Sunday
1968 & 1969



The Canadian National Exhibition is held annually in Toronto in late August and early September for a nineteen-day period, and includes three Sundays. The Western Fair in London is held in early September for a nine-day period including one Sunday. The Royal Agricultural Winter Fair is annually held during November at the C.N.E. grounds in Toronto for a nine-day period including one Sunday. In comparing Sunday attendance statistics with those of Saturday and the other days of the week, it should be noted that the legislation permitting the fairs to open Sundays provides that the gates shall not be open until 1.30 p.m., while there is no similar opening time for the other days of the week.

Generally, it may be concluded that Sunday attendance at these three fairs and exhibitions has been popular, and that more people have attended on Sundays than on the average weekday. However, Saturday attendance figures far outstrip those for Sundays. This is not surprising in view of custom and tradition in the province and the fact that Saturday openings are not restricted to the 1.30 p.m. starting time.

While it is difficult to establish trends over only a two-year period, it does seem that Sunday's percentage of the attendance has dropped slightly for both the Canadian National Exhibition and the Western Fair. These Sunday drops in attendance have been in the face of an overall decrease in C.N.E. attendance from 3,243,500 to 3,188,500, but with an increase at the Western Fair from 445,942 to 448,291. Sunday attendance increased at the Royal Agricultural Winter Fair from 82,000 to 89,000 in the face of a drop in total attendance for 1968 (92,556) to 1969 (89,579).

In the net result, Sunday is a popular day for all three events and public demand is likely to continue.

(d) Horse Races

By legislation which came into force on July 23, 1968, the municipalities were also enabled by bylaw to permit horse races to be held on Sundays. This new authority has not been exercised to the same extent by municipalities as with fairs and exhibitions. However, it is known that some horse racing has been permitted in both rural and urban communities throughout the province, and there is no reason to believe that the incidence of Sunday horse racing will not continue to increase.

The Jockey Club Limited, operator of several of the largest horse racing establishments in the province, made available to us attendance statistics from its three thoroughbred tracks which first commenced operation on Sundays in 1969. From these statistics, the following table was computed showing Sunday attendance as a percentage of attendance on other days of the week.

THOROUGHBRED HORSE RACING

average percentage attendance by day of the week — 1969

	<u>Wed.</u>	<u>Thurs.</u>	<u>Fri.</u>	<u>Sat.</u>	<u>Sun.</u>	<u>TOTAL</u>
Fort Erie						
(April 20–May 18)	15.2	12.9	13.0	26.2	32.7	100.0%
Woodbine						
(May 19–July 13)	13.8	11.5	12.4	33.3*	28.9	100.0%
Fort Erie						
(July 16–Aug. 30)	18.5	14.9	13.8	24.6	28.2	100.0%
Woodbine						
(Aug. 30–Oct. 26)	14.3	12.0	13.1	28.6	32.0	100.0%

*Included Queen's Plate Crowd (Sat. June 21 — 32,806)

Although the above is based on one year's experience only, it does seem clear that Sunday is the most popular day of the week, accounting for approximately 30% of the total five-day average attendance (i.e., an absolute range of 28.2–32.7%, which in actual numbers is an average attendance ranging from 10,369–13,947). Thus Sunday has been widely accepted by those who attend horse racing at these tracks.

In submissions by officials of the Jockey Club made at the public hearings, they stated that they were pleased that open Sundays had permitted increases in total attendance at the tracks which they chose to open in areas where the municipal council had passed the necessary bylaw. But they were also concerned about the 1.30 p.m. starting time.

They cited the difficulties of completing a full card of racing early enough for the convenience of the patrons, particularly in the fall when darkness sets in rather early. Also, they seemed to prefer a 12 noon starting time, or alternatively, a provision in the legislation permitting crowds to enter the stands before 1.30 so as to permit the first race to start sharply at that time.

(e) Other Cultural and Sporting Events

Our behavioural researchers looked for examples of Sunday cultural and sporting events and institutions which would provide good indicators as to the extent of Sunday participation.

On the cultural side, statistics were obtained from the Ontario Science Centre and the Royal Ontario Museum, both in Toronto although these institutions are well attended by persons from all parts of the province. Statistics from the Ontario Science Centre enabled the computation of the following table:

ATTENDANCE AT ONTARIO SCIENCE
CENTRE (Sept. 28, 1919 – March 14, 1970)

		Number	percentage Weekly Attendance	percentage Sunday over Saturday
<i>Adults</i>	Saturday	40,840	21.0	
	Sunday	87,836	45.2	215
	Weekly Total	194,324		
<i>Students</i>	Saturday	28,603	22.8	
	Sunday	39,023	31.2	136
	Weekly Total	125,187		
<i>Children</i>	Saturday	39,749	27.2	
	Sunday	56,248	38.5	142
	Weekly Total	146,041		
	TOTAL SATURDAY	109,192	23.2	
	TOTAL SUNDAY	183,107	39.3	
	GRAND TOTAL	465,552	100.0	

In its first six months of operation, the Ontario Science Centre drew almost 40% of its total attendance on Sundays, and Sunday attendance rates almost doubled those of Saturday (a direct contrast with Sunday movie and Sunday fair attendance). The second trend noted was that although Sunday was important for children, students and adults, it was relatively *more* important for the adult population. More than twice as many adults attended on Sunday than Saturday, while the increase for students and children was only 40% from Sunday over Saturday. Patrons interviewed at the Science Centre were either with friends or with family. One Science Centre official described Saturday as the day when the Centre performed a "baby-sitting function": children came or were sent to the Centre while parents were engaged in other activities. Sunday, in sharp contrast, was a family day, and most people in attendance were with family groups. Most of the patrons (83%) interviewed at the Centre reported that they attended less than once a month on Sundays, and also a great majority (76%) stated they hardly ever attended

during the rest of the week. Thus it may be concluded that the Centre is the type of cultural institution which attracts a broader spectrum of the population without a heavy reliance on repeat attendance.

The Royal Ontario Museum provided statistics enabling the computation of the following table:

ATTENDANCE AT THE
ROYAL ONTARIO MUSEUM
1959, 1964, 1969

	<u>Saturday Average</u>	<u>Saturday as % of the week</u>	<u>Sunday Average</u>	<u>Sunday as % of the week</u>
1959*	999.06	19.5	2,869.10	55.5
1964**	1,461.54	16.5	3,266.58	36.8
1969	2,502.77	16.5	4,862.65	32.1

*Old system of accounting is from November 1, 1958 to November 1, 1959. Saturday and Sunday from January 1, 1959 to December 31, 1959. Closed on Mondays. Building closed 6 days in August due to ruptured watermain and 1 Sunday for hydro repairs.

**King Tut Show in November.

While Sunday's percentage of the total weekly attendance seemed to decrease, the absolute figures for Sunday attendance almost doubled over the past ten years. Sunday still seems to draw approximately one-third of the total week's attendance (or approximately 5,000 per Sunday). Like the Science Centre, Sunday at the Museum would seem to outdraw Saturday by almost double (again a sharp contrast with movie and fair attendance).

It is important to remember that Sunday attendance at the Science Centre or the Museum is likely to be sporadic for most individuals throughout the year as compared with, say, television watching or church attendance. This was confirmed by the telephone survey in the three test communities where only 1% of the Toronto respondents reported they had attended a museum or art gallery the previous Sunday, and none in Peterborough or Goderich. The absence of any response for Peterborough and Goderich can be explained by the fact that the museum in Peterborough is small and has exhibits which are infrequently changed, while the museum in Goderich was closed on Sundays when the survey was taken. Yet it is equally important to remember that those times an individual does choose to visit such an institution are very likely to include Sundays, perhaps twice as often as Saturdays.

A total of 86 on-site interviews in the three test communities were conducted at locations related to cultural and sporting events. In Goderich and Peterborough, interviews were conducted on Sundays at the bowling alley and the skating arena. In Toronto, Sunday interviews were conducted at a wrestling match and a Junior A hockey game, both held at Maple Leaf Gardens, and also at the

Ontario Science Centre (making a total of seven locations in the three communities). Generally, those interviewed through random selection tended to be younger than those interviewed at the church, convenience and jug milk store, and grocery supermarket locations. They tended to follow the youthful pattern of the Sunday movie-going population, and the majority of those interviewed at the seven locations in the three communities were under the age of 25. Not surprisingly, a majority of those skating and bowling in Goderich and Peterborough did so with their friends (Goderich bowling 50%, Goderich skating 84%, Peterborough bowling 40%, Peterborough skating 73%), often with a member of the opposite sex. In Toronto, a majority appeared to attend the wrestling and hockey matches and the Science Centre with their family (wrestling 50%, hockey 60%, Science Centre 50%) but a large minority were also with their friends (wrestling 42%, hockey 34%, Science Centre 50%).

The Sunday bowlers and skaters in Peterborough and Goderich seemed to be fairly regular attenders, with the great majority engaging in that activity at least once a month (with 91% of the skaters in Goderich and 75% in Peterborough attending at least once or twice a month). The wrestling clientele in Toronto were a very loyal group and all interviewed said they had attended these matches at least twice a month on Sunday. Junior A hockey spectators tended to be somewhat more sporadic, with 60% saying that they attended less than once a month. With respect to the Ontario Science Centre (and consistent with the position stated earlier), 83% of those interviewed stated they attended less than once a month on Sundays.

4. *Transportation*

An attempt was made to investigate the propensity of Ontario residents to travel on Sunday within their community and throughout the province. Statistics were unavailable for air and rail travel, but data were obtained for public transit (bus and subway) and road traffic.

(a) Public Transit

The following data were obtained from Gray Coach Lines Limited concerning inter-urban transportation in Ontario by bus:

<u>GRAY COACH LINES: Inter-urban Passengers</u>			
<u>Year</u>	<u>Sundays as % of the week</u>	<u>% change in Sunday use (5 year periods)</u>	<u>% change in weekly use (5 year periods)</u>
1959	10.8	—	—
1964	10.1	+ 7.3	+ 14.3
1969	11.7	+ 9.7	— 5.3

The above indicates that Sunday is a relatively light day for inter-urban bus travel, accounting for only 11.7% of all inter-urban passengers. The importance of Sunday bus travel as a percentage of the total week's business has increased slightly over the past ten years, and the actual numbers of passengers utilizing the Gray Coach bus services on Sundays has increased substantially.

With respect to municipal transit systems, only Toronto of the three test communities examined has a public transportation system operating on Sundays. Statistics from the Toronto Transit Commission indicate that Sunday utilization of their facilities as a percentage of the total week, is decreasing:

TORONTO TRANSIT COMMISSION

Trends in Sunday Utilization 1959-1969

<u>Year</u>	<u>Sat./Sun. of week</u>	<u>Sunday as % of week (est.)</u>	<u>% change Sun. traffic (5 yr. period)</u>	<u>% change weekly traffic</u>
1959	16.6	5.2	—	—
1964	15.0	5.0	-7.5	- 5.1
1969	15.0	4.5	+4.6	+17.0

Sunday is also decreasing as a percentage of the total Saturday and Sunday traffic. In 1966, 32% of weekend traffic was on Sunday, while in 1969, it was only 29%.

In terms of actual numbers, there has been a 3.2% decline in the number of passengers carried on Sundays in 1969 as compared to 1959, while the percentage change in total weekly traffic has increased drastically. Therefore, while public transit in Toronto on Sunday is still used extensively, its importance in relation to other days of the week and in actual numbers is decreasing.

Whether this is as a result of a proportionate decrease in the movement of people in Toronto on Sundays or a reflection of the fact that more people have access to private transit is not entirely clear.

(b) Road Traffic

The Ontario Department of Highways provided 1969 daily traffic counts for several highway locations near the vicinity of the three test communities. The table below presents volume for a three-Sunday period in January 1969 as a percentage of total volume for a three-week period in the same month; volume for a three-Sunday period in July 1969 as a percentage of total volume for a three-week period in the same month; and Sunday volume in July 1969 as a percentage of Sunday volume in January 1969:

Highway Location	A	B	C
	Sundays in Jan. as % of week	Sundays in July as % of week	Sun. July Volume as % of January Sun. Volume
<u>RURAL</u>			
<i>(Wingham-Goderich)</i>			
Hwy. 4 — S. of 86	13.5	16.7	208.4
<i>Peterborough</i>			
Hwy. 7 — W. of 45	16.4	17.2	195.4
Hwy. 28 — S. of 507	14.7	11.2	252.4
Hwy. 401 — Newtonville	16.5	18.3	286.6
<i>Toronto</i>			
Hwy. 400 — Maple	18.7	18.0	209.8
Hwy. 401 — W. of 27	12.3	12.5	156.9
— Keele	10.9	10.8	126.8
— Markham Rd.	13.4	14.9	168.3
— Liverpool	13.2	15.0	170.0

Except for the locations on Highway 401 in and around Toronto, Sunday volume in July is double that of January. This is no doubt accounted for by vacation traffic and the existence of recreational driving conditions in July. The majority of the highways surveyed indicated that Sundays, as a percentage of the week's traffic, are higher than the average (i.e., 14.3%); the two highest being Highway 400 near Maple and Highway 401 near Newtonville (both on the way to prime recreational areas).

The two Highway 401 locations on the eastern edge of Metropolitan Toronto experienced a more marked increase in summer-time Sunday volume than did the locations to the west of Metropolitan Toronto. The increased traffic occasioned by summer cottagers returning from and destined for the vacation areas has a more pronounced effect on these two eastern Toronto locations.

Finally, it should be noted that Sunday remains a relatively lighter than average day on Highway 401 west of Highway 27 and across the heart of Metropolitan Toronto as indicated by the Keele Street traffic counter. These highways tend to be used more by people going to and from work, thus accounting for the lighter Sunday load.

5. *Socio-Environmental Indicators*

(a) *Crime*

Crime statistics are not kept by day of the week by the Ontario Provincial Police. However, the Metropolitan Toronto police were able to provide our behavioural researchers with data for the three types of crime: sex offences (not including rape), assaults (not

including indecent assaults), and robberies and attempted robberies (not including breaking and entering). These were the only statistics available with a "day of the week" breakdown. It must be emphasized that these three types of crime comprise *only* 7% of all crime committed in Metropolitan Toronto for the test years of 1967 and 1968 (for 1968, sex offences were 1%, assaults 4.7%, and robberies and attempted robberies 1.3%, for a total of 7%). Therefore, in considering the following tables, great care must be exercised in drawing conclusions which relate to all of crime. These tables are only a small portion of the total crime picture, but nevertheless they provide useful qualitative and quantitative information.

ASSAULTS (not indecent) BY THE DAY OF THE WEEK
1967 and 1968 (Toronto)

	<u>1967</u>			<u>1968</u>		
	<u>No.</u>	<u>% of total</u>	<u>Rank</u>	<u>No.</u>	<u>% of total</u>	<u>Rank</u>
Sun.	536	12.9	3	634	13.5	3
Mon.	416	10.0	7	461	10.0	7
Tues.	427	10.2	6	506	10.9	5
Wed.	461	11.1	5	493	10.7	6
Thurs.	493	11.8	4	533	11.6	4
Fri.	613	14.7	2	650	14.1	2
Sat.	894	21.7	1	897	19.4	1
No Day Stated	<u>327</u>	<u>7.9</u>	—	<u>441</u>	<u>9.6</u>	—
Total	4,167	100.0	—	4,615	100.0	—

ROBBERIES & ATTEMPTED ROBBERIES BY THE DAY OF THE WEEK
1967 and 1968 (Toronto)

	<u>1967</u>			<u>1968</u>		
	<u>No.</u>	<u>% of total</u>	<u>Rank</u>	<u>No.</u>	<u>% of total</u>	<u>Rank</u>
Sun.	108	10.2	7	145	11.3	7
Mon.	121	11.5	6	146	11.4	6
Tues.	125	11.8	4	160	12.5	4
Wed.	150	14.2	3	154	12.0	5
Thurs.	125	11.8	4	200	15.6	3
Fri.	205	19.4	1	218	17.0	2
Sat.	205	19.4	1	241	18.8	1
No day Stated	<u>16</u>	<u>1.5</u>	—	<u>19</u>	<u>1.5</u>	—
Total	1,055	100.0	—	1,283	100.0	—

SEX OFFENCES (not rape) BY THE DAY OF THE WEEK
1967 and 1968 (Toronto)

	<u>1967</u>			<u>1968</u>		
	<u>No.</u>	<u>% of total</u>	<u>Rank</u>	<u>No.</u>	<u>% of total</u>	<u>Rank</u>
Sun.	107	12.6	5	119	11.8	7
Mon.	113	13.3	3	120	11.9	4
Tues.	99	11.7	6	139	13.7	2
Wed.	110	13.0	4	120	11.9	4
Thurs.	117	13.7	2	120	11.9	4
Fri.	86	10.2	7	133	13.1	3
Sat.	118	13.9	1	148	14.6	1
No Day Stated	<u>96</u>	<u>11.3</u>	—	<u>117</u>	<u>11.6</u>	—
Total	846	100.0	—	1,016	100.0	—

It is clear from these statistics that Saturday is the day in which crime of all three types is most frequently committed in Metropolitan Toronto. Sunday had the least number of robberies and sex offences (although with sex offences the percentage change was not significantly great from day to day). A low robbery rate can probably be attributed to the fact that most commercial establishments are closed Sundays.

Sunday was the third highest day for assaults, and this might well be directly related to leisure time available and the intensity of informal interaction on that day. For both years, Saturday consistently ranked first, Friday second, and Sunday third. The leisure time during the week usually allocated to entertainment activities by the bulk of the population is on Friday and Saturday evenings. Characteristic of these hours is a more intense informal social interaction, often associated with higher rates of liquor consumption and lower rates of sleep. Understandably, these situations are more conducive to inter-personal conflict. Sunday, as the day following Friday and Saturday, is generally regarded as a day of rest and relaxation with leisure activities often centred around informal groups of family and friends with a reasonably high degree of social interaction as well.

The only comparable data provided by a jurisdiction outside of Ontario relating to crime rates by day of the week was from the city of Philadelphia. The following is the daily breakdown for the year 1968:

Philadelphia — Total Crimes by Day of Week

<u>1968</u>	<u>% of total</u>	<u>Rank</u>
Monday	13.4	3
Tuesday	12.6	6
Wednesday	13.3	4
Thursday	13.3	4
Friday	17.5	2
Saturday	18.6	1
Sunday	11.3	7
TOTAL	100.0	

The daily distribution of crime in Philadelphia would appear to be consistent with the pattern for sex offences and robberies in Ontario, i.e., the crime rate on Sundays is the lowest of all the days of the week. This hypothesis was corroborated by additional information we received from Kansas City, and Chicago.

(b) Motor Vehicle Accidents

Summaries of motor vehicle traffic statistics on Sundays were obtained for both the province of Ontario and the city of Toronto. They are set forth in the table below. Generally, over the past ten years, Sunday has ranked as the day with either the third or the fourth most accidents in the province, while in Toronto there have been consistently fewer accidents on Sunday than on any other day of the week. Like the crime rates, Saturdays, then Fridays ranked the highest.

MOTOR VEHICLE ACCIDENTS BY DAY OF WEEK

FOR THE YEARS 1959, 1965 AND 1968

ONTARIO

	<u>1959</u>			<u>1965</u>			<u>1968</u>		
	<u>Number</u>	<u>% of Total</u>	<u>Rank</u>	<u>Number</u>	<u>% of Total</u>	<u>Rank</u>	<u>Number</u>	<u>% of Total</u>	<u>Rank</u>
Sunday	11,623	14.2	3	16,979	13.2	4	19,893	12.8	5
Monday	10,475	12.8	4	14,731	11.5	7	18,171	11.7	7
Tuesday	9,762	11.9	7	15,418	12.0	5	20,685	13.3	4
Wednesday	9,778	12.0	6	15,395	12.0	6	18,191	11.8	6
Thursday	10,457	12.8	5	17,355	13.6	3	21,386	13.8	3
Friday	13,141	16.2	2	23,246	18.3	2	27,319	17.6	2
Saturday	16,282	19.9	1	25,338	19.7	1	29,482	19.0	1
TOTAL	81,518	100.0		128,462	100.0		155,127	100.0	

MOTOR VEHICLE ACCIDENTS BY DAY OF WEEK
FOR THE YEARS 1959, 1965 AND 1968

TORONTO									
	1959			1965			1968		
	Number	% of Total	Rank	Number	% of Total	Rank	Number	% of Total	Rank
Sunday	2,559	11.1	7	3,251	10.9	7	3,642	10.7	7
Monday	3,079	13.7	4	3,862	12.9	6	4,201	12.3	6
Tuesday	2,950	13.0	6	3,892	13.0	5	4,880	14.3	4
Wednesday	3,062	13.6	5	3,897	13.0	4	4,449	12.9	5
Thursday	3,167	14.0	3	4,347	14.5	3	5,221	15.3	3
Friday	3,723	16.6	2	5,231	17.5	2	6,050	17.7	1
Saturday	4,032	17.7	1	5,338	17.8	1	5,642	16.9	2
TOTAL	22,572	100.0		29,818	100.0		34,085	100.0	

The low level of Sunday accident rates in Toronto can be attributed to the absence of rush-hour conditions and the comparatively relaxed Sunday atmosphere. On the other hand, many Toronto people are out on the highways throughout the province on Sunday, and, as noted in a previous section, provincial highways are comparatively well used on Sundays. Indeed, in the light of the earlier information, it is surprising that there is not a considerably higher motor vehicle accident rate throughout the province on Sundays.

Statistics provided by the State of Massachusetts and the city of Philadelphia permitted the computation of a third table, below.

MOTOR VEHICLE ACCIDENTS IN
ONTARIO, MASSACHUSETTS, TORONTO AND PHILADELPHIA
BY DAY OF WEEK, 1968

	<u>Ontario</u>		<u>Massachusetts</u>		<u>Toronto</u>		<u>Philadelphia</u>	
	<u>% of Week</u>	<u>Rank</u>	<u>% of Week</u>	<u>Rank</u>	<u>% of Week</u>	<u>Rank</u>	<u>% of Week</u>	<u>Rank</u>
Sunday	12.8	5	13.3	4	10.7	7	15.0	3
Monday	11.7	7	12.4	6	12.3	6	12.3	5
Tuesday	13.3	4	11.7	7	14.3	4	12.0	6
Wednesday	11.8	6	13.0	5	12.9	5	11.6	7
Thursday	13.8	3	13.9	3	15.3	3	12.6	4
Friday	17.6	2	17.4	2	17.7	1	16.3	2
Saturday	19.0	1	18.3	1	16.9	2	20.2	1
TOTAL	100.0		100.0		100.0		100.0	

Generally, figures for the State of Massachusetts are consistent with those of Ontario, but the high Sunday rankings in Philadelphia indicate a different situation than exists on the streets in Toronto on Sundays.

(c) Noise Pollution

In attempting to determine the nature of Sunday in Ontario in 1970, our behavioural researchers were repeatedly told by respondents in the telephone survey and at the various on-site locations that Sunday was a "day of rest and relaxation". They considered it relevant to this common characterization of Sunday to determine both quantitatively and qualitatively how quiet Sundays actually are, or conversely, how much and what type of noise occurs on weekdays that does not occur Sundays. As there did not appear to be any existing research of this kind in Ontario, a firm called Noise Control Consulting Services was retained to take Sound Pressure (Noise Level) readings at three sites in Metropolitan Toronto. These readings were taken: (1) on weekday mornings (10–11 a.m.); (2) on weekdays during rush hours (4.30–5.30 p.m.); (3) on Sunday mornings (9 a.m.–12 noon); and (4) on Sunday afternoons (1.30–4.30 p.m.). All readings were taken in the period April 14–26, 1970. Readings were of one hour duration at each location, and specific readings were taken at one minute intervals, for ten seconds. Also, while readings were being taken, visual observations were made to determine all noise sources, provided they were considered to be relative to the sound pressure level readings.

The following three sites in Toronto were selected:

- (i) Keele Street and Sheppard Avenue intersection (suburban intersection at two heavily travelled streets);
- (ii) High Park at Grenadier Pond (the south end of this recreational area is close to the Queensway, the Gardiner Expressway and the C.N./C.P. tracks); and
- (iii) Nathan Phillips Square (Toronto's Acropolis).

According to Noise Control Consulting Services: "most experts in the field of noise control and those medical personnel who specialize in the effects of noise feel that a maximum level of seventy decibels (dBA) should be enforced to prevent noise pollution." In the table below, column A indicates the number of readings at each location which were in excess of seventy decibels, and column B indicates the number of readings in excess of seventy-five decibels. Column C lists the average reading at each location and column D the highest reading recorded in each *one hour* period.

Noise Readings at three Toronto Locations April, 1970

	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>
	<u>Readings over 70 dBA</u>	<u>Readings over 75 dBA</u>	<u>Average Reading</u>	<u>Highest Level Recorded</u>
<i>Keele & Sheppard</i>				
weekday a.m.	13	2	67	82
rush-hour p.m.	14	6	67	82
Sunday a.m.	13	0	65	74
Sunday p.m.	8	1	63	76
<i>High Park</i>				
weekday a.m.	3	0	60	72
rush-hour p.m.	15	5	67	80
Sunday a.m.	2	0	61	73
Sunday p.m.	10	1	65	76
<i>Nathan Phillips Square</i>				
weekday a.m.	7	0	63	75
rush-hour p.m.	13	0	67	74
Sunday a.m.	19	0	68	74
Sunday p.m.	29	6	70	75

At the Keele and Sheppard intersection, Sunday was generally a quieter day than during weekdays.

There were six readings over 75 decibels in the weekday rush-hour, while only one on Sunday. The highest level reached on Sunday was only 76 decibels as compared to a maximum of 82 decibels on the weekday. The sources of noise at this location were automobiles, motor cycles, TTC buses, construction vehicles, trucks, aircraft, children and pedestrians. Generally the high weekday peaks were caused by heavy trucks accelerating.

In High Park at the south side of Grenadier Pond, Sunday was only marginally quieter than on a weekday. In fact, Sunday morning was slightly noisier than the average weekday morning, but in the afternoons, the weekday rush-hour recorded five readings in excess of 75 decibels, including one over 80, while on Sunday there was only one reading over 75. The noise sources here were from streetcars, automobiles, C.N./C.P. trains, GO trains, motor cycles, trucks, helicopters, aircraft, children, and pedestrians.

In Nathan Phillips Square, Sundays turned out to be noisier than weekdays, particularly in the afternoon. A loud-speaker system which broadcast music through several loud-speakers situated around the skating rink was the major source of the noise, and it was in fact so loud that it often masked completely all other noise sources.

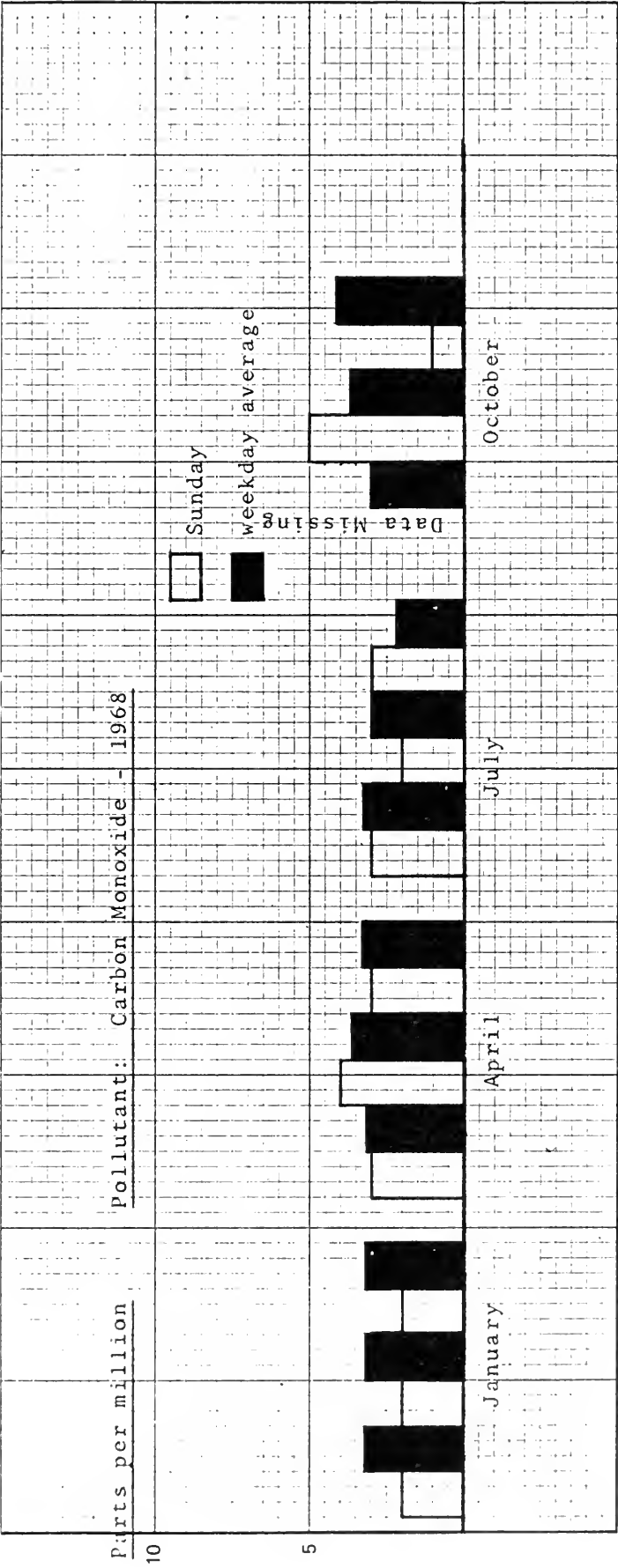
The noise sources were the water fountain, radio loud-speakers, the clock, streetcars, automobiles, aircraft, trucks, TTC buses, pedestrians and a helicopter. Readings were taken in three locations in the Square: at the east end of the skating rink, at the west end of the skating rink, and in the centre of the Square. At the latter location, noise levels were invariably lower than at the other locations, due to the distance from the loud-speakers and the water fountain.

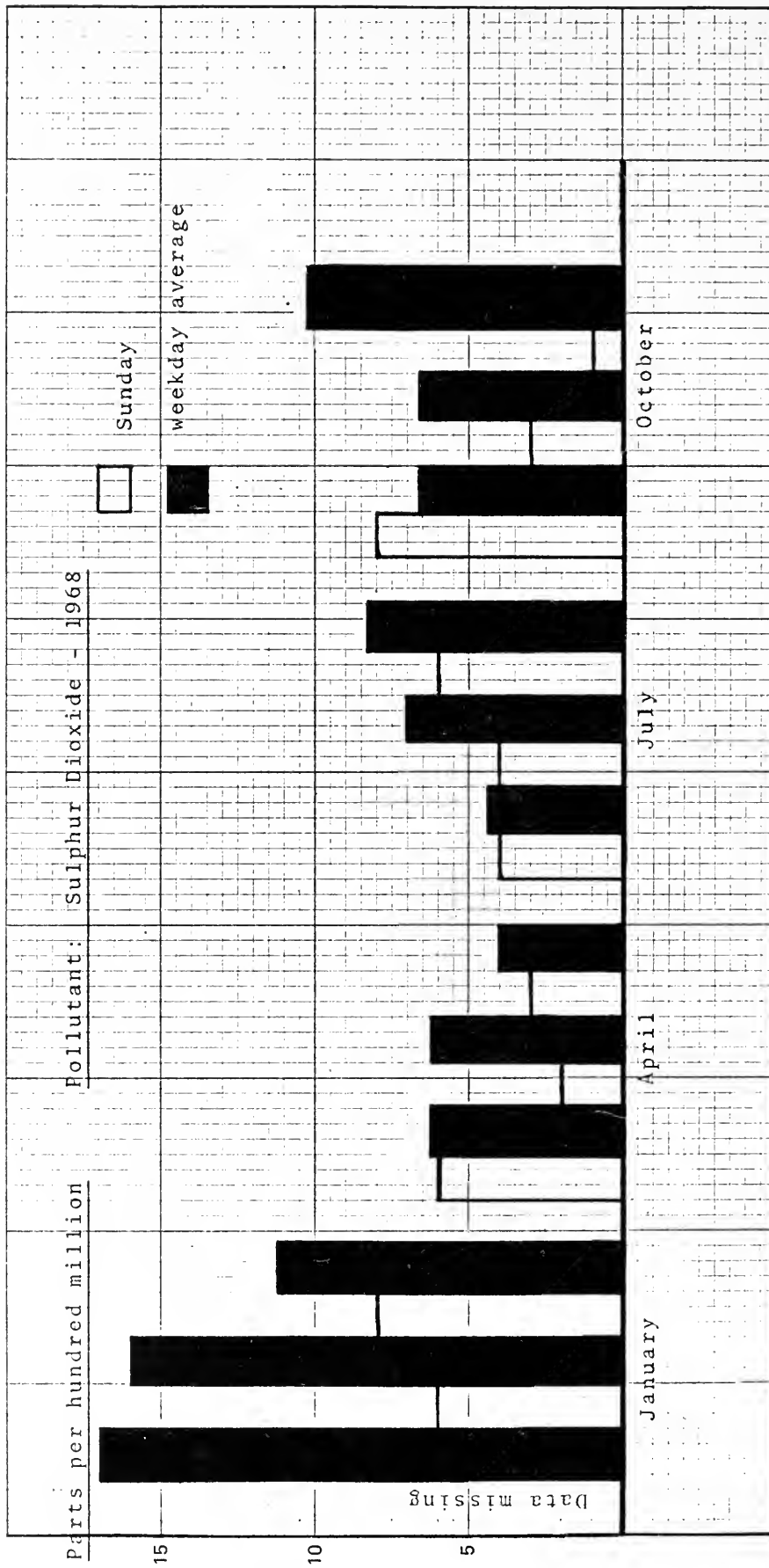
In summary, then, except for the idiosyncratic Nathan Phillips Square location, the intersection and park noise readings provided evidence for the following very tentative conclusions: noise pollution levels for comparable time periods tend to be slightly lower on Sundays than on weekdays; in addition, the noise peaks reached on weekdays are not heard as frequently on Sundays. The latter conclusion is significant since the high noise peaks are the most aggravating to the human condition.

We are cognizant of the tentativeness of the above conclusions on the basis of the limited evidence obtained. Certainly tests at a great many more locations throughout the province including Toronto should be taken before drawing general province-wide conclusions concerning the extent of noise pollution on Sundays, as compared with other days of the week. However, we considered it necessary to set forth these limited research results as a means of drawing attention to the relationship of noise abatement and the preservation of a Sunday environment.

(d) Air Pollution

Our behavioural researchers sought also to determine the extent of air pollution on Sundays, as compared with other days of the week. At present, the only source of meaningful statistics in this field is the Air Management Section of the Ontario Department of Energy and Resources Management which records readings taken at 67 College Street in Toronto. Readings taken during the first three weeks of January, April, July and October in the year 1968 were obtained for both carbon monoxide and sulphur dioxide. The first graph following shows the various levels of carbon monoxide and the second graph shows the sulphur dioxide levels:





The first graph shows that the level of carbon monoxide, a major source of which is car and truck exhaust, tends to be slightly lower on Sundays than on the average weekday. The notable exception occurred on the Sunday prior to Thanksgiving, at which time traffic was probably much heavier than usual. Overall, the level of carbon monoxide on both Sundays and weekdays was lower than the level the Department deems unacceptable, namely four parts per million. However, Sunday was by far the more pollution-free day.

Sulphur dioxide pollution followed much the same pattern. This chemical is a by-product of the process used to produce heat, and it can be expected to be at much higher levels in the air during the winter season. The higher weekday production of sulphur dioxide can be attributed to the higher production of electricity at such places as the Hearn Generating Station in Toronto to meet the increased demands occasioned by industry on weekdays. The level of sulphur dioxide for the months examined again was under the level the Department deems unacceptable (25 parts per hundred million).

In sum, the air in downtown Toronto is generally cleaner and purer on Sundays as compared with other days of the week.

6. *A Bird's Eye View of Informal Activity on Sunday*

The telephone survey conducted in the three test communities provided perhaps the greatest insight into the type of day Sunday is for most people in Ontario. It will be recalled that this survey consisted of 359 telephone interviews, 45 in Goderich, 98 in Peterborough and 216 in Toronto.

The overwhelming majority of the respondents in all three communities reported that they looked forward to Sunday (Toronto 88%, Peterborough 94%, Goderich 76%). When questioned as to whether or not they were happy on the previous Sunday, the overwhelming majority replied in the affirmative (Toronto 89%, Peterborough 93%, Goderich 89%). Generally then, Sunday is a day looked forward to as a pleasant, happy day of the week by the great majority of people in Ontario.

Using a structured list of activities in which persons might possibly engage on Sundays, it was found that the six most frequent Sunday activities among the telephone respondents were: (1) watching television; (2) household chores; (3) visiting friends and relatives; (4) going for a drive; (5) going to church; and (6) listening to the radio or reading newspapers (not necessarily in that order).

The above activities would appear to be consistent with the responses obtained by our researchers through the format used in the on-site interviews at the 63 locations in the three test communities where, in response to the general questions "What is the meaning of Sunday for you? what does your Sunday usually consist of?", the great majority of respondents replied that "resting and relaxing" was the most common activity. This general response would seem to be consistent with most of the six activities ranking the highest

in the structured telephone questionnaire, except for household chores, which could hardly be construed as forms of rest and relaxation. In any event, it may be said that for the majority of Ontarians, Sunday is a day of rest and relaxation during which the characteristic behavioural pattern is informal interaction among friends and relatives and media use in the home.

While T.V. and radio use and church attendance have already been considered, it is useful to examine the telephone survey responses with respect to the other activities listed above as being the most frequently engaged in on Sunday. Of those engaging in household chores, it is not surprising that the overwhelming majority were women. It also appeared that there is a greater tendency in the city to use Sunday for household chores as compared with the smaller town (Toronto 67% of respondents, Goderich 47%).

Similarly, a greater percentage of city people visit friends and relatives on Sundays, compared with those in the smaller town (Toronto 50%, Peterborough 50%, Goderich 36%). The great majority of all those who visited friends and relatives the previous Sunday in the three communities did so with their families. It is not surprising that the urban areas would score higher for Sunday as a day of visiting, since these areas are often characterized as lacking in close personal contact that exists throughout the week in the smaller towns. In sum, it would appear that Sunday visiting is more important for urban people than rural people.

A substantial number of people in all three communities went for a drive on Sundays (Toronto 39%, Peterborough 55%, Goderich 33%). The particularly large percentage of those in Peterborough might be explained by the fact that Peterborough is in the midst of the Kawartha lakes district, and a considerable percentage of its residents take advantage of the scenic setting. While fewer respondents from Goderich than from the other two communities went for a drive, it is also significant that those who did go for a drive in Goderich went for the longest average time (2 hours, as compared with 1½ hours in each of Toronto and Peterborough). The reading of newspapers on Sunday is considerably higher in the city (Toronto 48%, Peterborough 41%) than in the smaller town (Goderich 20%). The reason for this disparity would seem to be both the question of availability and local reading habits of rural people as compared with urban people. That Sunday is a day for reading in the city was further confirmed by the response relating to a question on the reading of books (Toronto 31%, Peterborough 19%, Goderich 13%). On the other hand, there would appear to be no significant differences between urban and rural habits as to listening to records or tapes on Sundays (Toronto 26%, Peterborough 20%, Goderich 24%). Well over two-thirds of this group in all three communities replied that listening to records or tapes on Sunday was a family activity.

The relative percentages of those interviewed in the three test communities who engaged in indoor and outdoor games on Sunday were relatively small (indoor games: Goderich 11%, Peterborough 4%,

Toronto 11%; outdoor games: Goderich 7%, Peterborough 17%, Toronto 10%). At least two-thirds of those in all three communities engaging in indoor and outdoor games did so with members of their family. The higher proportion of outdoor as opposed to indoor games in Peterborough might be explained by the fact that the survey was taken in February, March and April and Peterborough is accessible to outdoor recreational areas for skiing and snowmobiling.

Another reasonably popular Sunday activity among residents in the three test communities was walking (Toronto 30%, Peterborough 35%, Goderich 16%). This activity would include sightseeing and window-shopping on foot. The hypothesis that walking is more frequent among urban dwellers rather than rural dwellers was confirmed by those in the three communities who said they went to parks or recreation areas on Sunday (Toronto 14%, Peterborough 12%, Goderich 9%). In addition, there was a direct relationship between the size of the community and the average length of time spent in the parks or recreation areas (Toronto 3 hours, Peterborough 1¼ hours, Goderich ¾ hour). In addition to revealing the habits of urban as opposed to rural dwellers on Sunday, this data does seem to indicate the necessity for parks and recreational areas in the cities as a break from the synthetic environment and the hectic pace of life, whereas persons in the smaller towns find a lesser need for such planned facilities.

Another Sunday activity popular among a minority in all three communities is writing letters (Toronto 13%, Peterborough 7%, Goderich 18%).

Using the telephone is another popular activity on Sundays among a minority (Toronto 35%, Peterborough 30%, Goderich 9%). Again here, there is a direct relationship between the size of the community and the percentage of its residents who employ the telephone on Sunday, although one would expect the same result to obtain for any other day of the week as well.

Hobbies account for Sunday activities of far more people in the city than in the smaller towns (Toronto 19%, Peterborough 9%, Goderich 4%). This urban phenomenon can be explained by the availability of supplies, clubs, facilities and other persons who are interested in the same hobby, and by many persons in the city to off-set the vicissitudes of an urban high-rise environment.

A significant minority (Toronto 36%, Peterborough 17%, Goderich 39%) replied that there were "other" activities in which they engaged on the previous Sunday. When queried further, they almost invariably referred to "sleeping" or "resting".

7. *Summary*

To sum up Sunday in Ontario in 1970 in a paragraph, it is a day to which people look forward, characterized by rest and relaxation, leisure and recreational activities and informal interaction among

friends and relatives. Many persons spend significant amounts of time watching television, doing household chores, visiting, going for a drive, listening to the radio or reading, going for a walk or playing sports. A substantial minority still attend church regularly although the proportion is decreasing particularly in the cities; at least a quarter of Ontarians do not attend church at all. At least one out of eight either work or engage in some work-related activity for some part of the day. Sunday tends to be more of a family day for many activities, including visiting, media use, driving, attending movies, museums, horse races, and recreation in general. It is the biggest day of the week for attendance at the Royal Ontario Museum and the Ontario Science Centre, thoroughbred horse races, skating rinks, jug milk stores, and for highway use (especially near recreational areas) and television watching (between 1-4 p.m. and 5-8 p.m.); it falls behind Saturdays for attendance at movies and fairs and exhibitions although it exceeds other days of the week; and it is one of the poorest days of the week for supermarkets, inter-urban bus lines, the TTC, and gasoline stations in the city. Crime rates, automobile accidents in the city, noise pollution and air pollution are generally lower on Sunday than on any other day of the week. Finally, there are significant differences between the behaviour of urban and rural Ontarians on Sundays: urban dwellers attend church less frequently and do more formal visiting, pleasure walking and driving, and reading; rural dwellers, conversely are more frequent church attenders and are more apt to engage in sports and letter-writing. People in the city are more apt to watch some television on Sundays, but those who do watch television in the smaller communities probably do so for longer periods. People in Ontario are generally happy on Sundays, probably more so than on most other days of the week.

B. SOCIAL EFFECTS OF SUNDAY AS A DAY OF REST

In addition to the perceived behaviour of Ontario residents on Sunday, it is useful also to consider comparisons between those persons who regularly work Sundays and those who are able to have Sunday as a day of rest, as a means of measuring, both quantitatively and qualitatively, the social advantages and disadvantages accruing to the respective groups. Two such studies have already been conducted in Canada in recent years, one in Ontario and the other in Quebec. Rather than duplicate this research we thought it would be more useful to draw relevant findings from it to supplement the independent type of behavioural research extensively outlined in the previous section of this chapter.

The Ontario research project was entitled "Impact of Continuous Employment on Family and Community Life" and was conducted in 1966-67 under the direction and supervision of Dr. A. J. O. Farina, Professor of Social Work at the University of Toronto. The research project was an undertaking of the Lord's Day Alliance of Canada, and financial support was received from the Canadian Catholic Conference and the Research Branch of the Ontario Department of Labour. Twelve students in the Masters Programme at the School of Social Work at the University of Toronto undertook the necessary field work

and analysis of data.

The Quebec study was initiated in 1965 by the Public Inquiry Commission concerning Sunday Observance in Québec Pulp and Paper Mills (the Almey Commission) and was carried out by a sociological research team under the direction of Miss Jacqueline C. Massé, Assistant Professor in the Department of Sociology at the University of Montreal. Her mandate was to investigate the repercussions of Sunday work on the workers with special consideration of the religious, social and family aspects.

Summaries of these two projects will constitute the remainder of the chapter. In assessing these research results, care should be taken in drawing broad inferences from what are essentially rather narrow ranges of social effects. Certainly the activities covered (as with the previous section of this chapter) do not purport to represent the total range of human activity on Sundays, but are merely social indicators of the impact of continuous employment on those who have chosen or have been required to adopt this life style.

1. *University of Toronto School of Social Work Study, 1966-67*

This study involved in-depth interviews with 421 workers spread over the three Ontario communities of Hamilton, Cornwall and Sudbury. These three communities were chosen because there was a significant proportion of the population engaged in continuous employment in each city. It had also been the intention of the research team to examine workers in Stratford, where continuous production is minimal, but this did not prove to be feasible. The 421 workers were almost evenly distributed between those engaged in continuous employment (201) and those in non-continuous employment (220). By "continuous employment" is meant working in industries or services operating at least six and one half days per week, where employees do not regularly have Sunday and all or part of Saturday as non-work days.

The two sample groups (continuous and non-continuous) in each community were broken down into those who were employed on shift work and those who were not on shift work, so that there was a total of four quadrants into which the workers in each community were divided: quadrant one — continuous employment shift work; quadrant two — continuous employment non-shift work; quadrant three — non-continuous employment shift work; quadrant four — non-continuous employment non-shift work. The 421 respondents were comprised of 247 shift workers and 174 non-shift workers.

The division of the 421 respondents by community was Hamilton — 145, Sudbury — 114, and Cornwall — 162. Established methods of sample selection were used in each community, and the completed interviews were carefully sorted into the appropriate quadrants, and the results were put on a computer. The research group had originally set out to conduct 1,080 interviews, so the completed 421 (40%) interviews does place some limitation on the representativeness of the sample.

Given the above methodology, each of the 12 graduate students put forward a hypothesis relating to the impact of continuous employment on family and community life, to be tested against interview results from the sample group of 421 workers. Some of these hypotheses had been developed previously, while others were explorative or representative of intuitional concerns of the researchers.

Only a portion of the hypotheses put forward by the researchers were supported by the responses of the 421 workers interviewed. For example, Fred Clarke hypothesized that the incidence of voluntary registration and attendance in educational or self-improvement courses of instruction is less for persons employed as part of continuous production industry or continuously operating services than it is for persons regularly employed in industries or services not operating continuously. This hypothesis was not supported by the responses of the 59 out of 421 who had indicated they had voluntarily registered and attended courses of instruction outside the home.

On the other hand, Sheena Findlay studied the association between the involvement of the main bread-winner in continuous employment and family participation in religious observances and church-centred activities. She was able to prove from the sample that those in continuous employment attended their religious observance less frequently than those in non-continuous employment (e.g., 32.54% of those in continuous employment and 24.69% of those in non-continuous employment had not attended their religious observance in the previous month; also, 60.94% of those in continuous employment and 67.46% of those in non-continuous employment attended from one to five times in the previous month). On the basis simply of attendance and non-attendance, Cornwall had the highest percentage attending and Hamilton the lowest.

The results concerning attendance at religious observance must be considered with the results from a question relating to involvement in five different types of church-centred activity. In this case, those in continuous employment had a higher rate of involvement than in non-continuous, by well over 5%, and conversely, there were fewer uninvolved in continuous employment than in non-continuous employment. Thus it might be concluded from her results that those in continuous employment are not able to attend church regularly, but have a higher degree of involvement in other church-centred activities. The Roman Catholics in continuous employment had less difficulty attending church regularly than did the Protestants, presumably because of their more flexible hours for attendance at mass.

It was significant that close to 40% of those in continuous employment reported feeling conflict between family participation in church activity and their hours of work. 15.95% of those in continuous employment would have dealt with this conflict by obtaining a change in traditional hours of church-centred activity, rather than a change in the hours of work, and this feeling was strongest in Hamilton, where 21.36% advocated such a change. There was an overwhelming number of workers in both continuous and non-

continuous employment who opposed Sunday work. Of those in continuous employment, 59.15% were against it, 27.21% said they would do it but preferred not to, and 13.62% said they did not mind (as compared with non-continuous percentages of 68.07%, 19.27% and 12.66% respectively). The most significant statistic here is the combination of those who were in continuous employment who were either against Sunday work or who would do it but preferred not to, a total of 86.36%.

Jack Harmer hypothesized that in families where either of the parents is engaged in continuous employment and where there are one or more children attending school and living at home, these families will be engaged in fewer "family unit" activities than families where neither of the parents is in continuous employment. This hypothesis was largely proved by the test sample in the three communities with respect to family unit activities within the home. It was found that for activities outside the home, there was no difference between those in continuous employment and in non-continuous employment. A great many workers in the continuous employment quadrant in the three communities indicated quite frequent or very frequent interference in family unit activities resulting from their days off. The non-continuous sample who regularly had Sunday and at least half of Saturday off work seldom indicated that their day off interfered with family unit activities.

Maureen Styffe hypothesized that there is a significant level of difference between the frequencies of participation in free-time activities by continuous and non-continuous employment workers. After analyzing the sample, she found that, while there were no significant differences in participation rates generally or in "intellectual" or "self-improvement" and "cultural" activities, the continuous group did tend to participate to a lesser extent in "physical" and "social" activities.

Another study by Heather Fisher sought to explore the frequency of participation in child-rearing activities for school-age children by bread-winners in non-continuous employment. She looked at six areas of child-rearing: nutrition, education, discipline, companionship, guidance, and transmission of values. She found that there were no significant differences in four of the six areas, but on nutrition and discipline those in non-continuous employment fared better. For example, parents in non-continuous employment participated more frequently in preparing meals than those in continuous employment. Also, those in non-continuous employment were more frequently the parental disciplinarian, while those in continuous employment tended to discipline their children with the cooperation of their spouse under a mutual disciplinary regime. Otherwise, Miss Fisher's hypothesis was not supported by the results.

Sally Van Luven hypothesized that children of parents, at least one of whom was engaged in continuous employment, have significantly lower academic achievement than children of parents, neither of whom are engaged in continuous employment. This hypothesis was proved by the sample results: the percentage of "A" averaged by

children of parents in continuous employment was less than that of children of parents in non-continuous employment, and they had more "F" percentage averages; also, there were significantly more failures among children of those in continuous employment (6.3%) than in non-continuous employment (1.5%). Thus Miss Van Luven was able to conclude that there is a significant association between continuous employment and a higher failure rate of their children, combined with a lower incidence of "A" or "B" averages.

Several of the other students put forward hypotheses which were not proved by the sample results. For example, Bernie Zaharik suggested that individuals employed in continuous employment participate in fewer voluntary community organizations than do individuals who are not in continuous employment. He found no significant differences between the two groups tested. Mary Stewart hypothesized that individuals on continuous employment voluntarily terminate employment more frequently than do individuals in non-continuous employment. Out of a total sample of 39 workers, she found just the reverse to be true.

In summary, it should be apparent that the conclusions and inferences that one can draw from this study are limited. Certainly there are significant differences relating to attendance at religious observances, family unit activities in the home, participation in physical and social free-time activities, preparation of meals and discipline for children in the home, and academic achievement of children in school. But these differences favouring those in non-continuous employment would seem to be off-set by the differences favouring persons in continuous employment, such as the incidence of voluntary registration and attendance in educational courses, participation in voluntary community organizations, and a decreased incidence of voluntary termination of employment.

Combined with this diversity of result is the fact that the undesirable social effects of continuous employment do not necessarily relate directly to the question of work on Sunday, but generally to the type of work week where the pause days (usually two in number) are staggered from week to week so that the continuous production employee has as many Sundays off as other days of the week. The only responses related directly to Sunday work were those analyzed by Sheena Findlay, and they did appear to be conclusive of a prevailing negative attitude to Sunday work among both continuous employees (59.15% against; 27.21% would do it but preferred not to) and non-continuous employees (68.07% against; 19.27% would do it but preferred not to). In fact the negative attitude to Sunday work was almost as high among continuous employees (taking the two categories together, 86.36%) as among non-continuous employees (87.34%).

In his description of the project results, Dr. Farina made reference to a body of literature describing earlier research projects conducted in various parts of the world studying the question of weekend work. These projects, together with short descriptions, are listed following:

(1) Pigors, Paul and Faith, *Human Aspects of Multiple Shift Operations* (M.I.T., 1944). This study suggested a reason why the worker who has to work on weekends may encounter difficulties in family and community relations:

He (the shift worker) is living in two communities that are run on different time schedules. The whole community works on the assumption that a working week normally stops on Saturday. That a weekend is always of the same length and that it always comes at that time. When an industrial community operates on a five-day week . . . the five days worked at the plant are the same as the five days worked in the community outside the plant . . . rest still comes at the end and at the same time when others have a day off . . .

. . . But most workers greatly prefer a work week of 50 hours or more within five days to a week of 40 hours or even less spread over six or seven days.

(2) Mann, Lloyd C. and Hoffman, L. Richard, *Automation in the Worker* (New York, 1960). This study concluded that the more deformation or irregularity caused by shift work for the worker, the more intolerant he would become of this kind of work.

(3) Brown, Hilda G., "Some Effects of Shift Work on Social and Domestic Life", *Yorkshire Bulletin of Economic and Social Research* (occasional paper no. 2, March, 1959). This paper referred to a study made of a steel mill in England which introduced a continuous work week and shift rotation system providing for four full weekends off in thirteen weeks. The production workers in 52% of the cases indicated that they were better off under the new system in terms of the amount of time they could spend with their wives. Also, only a small proportion of the respondents felt that their leisure time was affected less favourably and engagement in organized community activity was negatively affected for only a small minority of the workers. It was pointed out however that a high proportion of those respondents who found the shift rotation and continuous work week system "better" had been accustomed to some weekend overtime before the change and the new system gave them more time off.

In another study of non-continuous shift work, Miss Brown found that shift work, in contrast to straight day work, increased the opportunities for family life and that the advantages of shift work for the workers and his family outweighed the disadvantages. She found the view confirmed that there was greater acceptance of shift work where people were accustomed to it than where it was a recent innovation. Closely related to this was the impression that acceptance of it is more general in communities where it was a common pattern of community living than where it was new or rare. The significant conclusion she reached was that the possibility of higher earnings on shifts probably was the chief attraction and the chief inducement to start shifts.

(4) Dankert, Clyde E., Mann, Lloyd C., and Northrup, Herbert P., *Hours of Work* (New York, 1965). This book refers to a study of an electrical and gas utility in the mid-western United States in which it was indicated that shift work could serve as an advantage to certain people. It noted that for the person who prefers to be someone isolated from others, shift work relieves him of his family and community responsibilities to at least some degree. It is socially acceptable to claim exemption from home and community responsibilities if one's work is such as to justify such disengagement.

Mann also described his work under the Industrial Mental Health Program in which he found that there were causal links between shift work and marital and familial integration in his United States sample. He also found links between shift work and psychological as well as physical health.

(5) Mott, Paul E., *Shift Work: the Social, Psychological and Physical Consequences* (Ann Arbor, 1965). The review of literature in this book indicated that interference with family life was the most common complaint about shift work. There was a recurring theme that shift work reduced the opportunities for contact between family members. His findings suggested that shift work interferes with the worker's role or behaviour in certain valued activities. The greatest difficulties were related to the father role. Further significant interference was noted in the husband role in difficulties in developing mutual understanding with the worker's wife.

(6) A study by Ulich on German workers showed that 74% of the married men and 45% of the single men who followed the shift schedule complained of disturbances in family life. Data obtained from Dutch workers in Philip's factories also pointed out the frequency of family problems arising from shift work.

All of the above studies cited related to shift work, which may or may not have involved Sunday work. While they do provide some insight into the implications of shift work to family and community life, they do not necessarily focus on the problem of continuous employment involving a staggered pause day, and accordingly their conclusions summarized above should be treated with some caution as applied to Sundays.

2. *The Allyn Commission Study in Quebec*

This study was concerned with the social repercussions of Sunday work, particularly as it related to leisure, family interaction and religion. Three different regions in the province of Quebec were selected as representative, and out of these three regions the names of 368 workers were selected. Half of them worked in pulp and paper mills and the other half in the aluminum industry or the plywood industry. After the application of selection processes, 68% of those workers selected agreed to submit themselves to interviews, or 248 workers in all. Of these, 93 were on non-continuous production (i.e., always had Sunday off), while 155 were on continuous production (only occasionally had Sunday off). Interviews were conducted in the summer of 1965.

The results of the interviews pointed to a number of conclusions. First, the activity most engaged in on a regular basis on Sunday by all workers was attendance at mass (88%). This was closely followed by staying home and resting, although it was not done as regularly as attendance at mass. The most engaged-in individual activities on Sundays for all workers were watching television (29% regularly, 58% occasionally), and reading (28% regularly, 53% occasionally). The most frequent family activities were going for a drive (42% regularly, 49% occasionally) and supervising homework (34% regularly, 41% occasionally). The most common social activity on Sundays was meeting with relatives and friends, while playing sports followed.

Compared with the telephone survey conducted by our researchers in the three Ontario communities of Toronto, Peterborough and Goderich, it would appear that Quebecers are far more likely to engage in church attendance or go for a drive on Sundays than Ontarians, while television watching, reading and visiting relatives and friends would appear to be popular in both provinces. However, close comparisons are difficult in view of the different formats utilized in conducting research and the nature of the persons selected for sampling.

In comparing the 93 non-continuous workers with the 155 continuous workers, Miss Massé found that the continuous production workers tended to have fewer activities on Sunday even when they had that day off, than did the non-continuous production workers.

Percentage distribution of the workers according to the frequency of personal activities on Sunday-holiday of those always on leave on Sunday (Workers interviewed: 93) and of those who are occasionally on leave on Sunday (Workers interviewed: 155)

	Regularly			Occasionally			Never		
	6 days %	7 days %	Dif. %	6 days %	7 days %	Dif. %	6 days %	7 days %	Dif. %
Absence of activity									
Stay at home.....	55	42	-13	40	51	+11	5	7	+ 2
Rest-sleep.....	39	29	-10	48	58	+10	13	13	0
Individual activities									
Television.....	33	27	- 6	56	59	+ 3	11	14	+ 4
Reading.....	28	27	- 1	48	56	+ 3	24	17	- 7
Repairs on house.....	9	12	+ 3	9	15	+ 6	82	73	- 9
Tinkering on car.....	4	5	+ 1	28	24	- 4	68	71	+ 3
Movies.....	3	0	- 3	25	36	+11	72	64	- 8
Lectures.....	1	2	+ 1	5	12	+ 7	94	86	- 8
Family activities									
Ride in the car.....	49	37	-12	39	56	+17	12	7	- 5
Supervising homework....	41	29	-12	32	46	+14	27	25	- 2
Baby-sitting.....	13	8	- 5	48	42	- 6	39	50	+11
Cottage.....	17	15	- 2	39	43	+ 4	44	42	- 2
Shopping.....	11	4	- 7	19	20	+ 1	70	76	+ 6
Camping.....	4	3	- 1	17	19	+ 2	79	78	- 1

	Regularly			Occasionally			Never		
	6 days 0 ₀	7 days 0 ₀	Dif. 0 ₀	6 days 0 ₀	7 days 0 ₀	Dif. 0 ₀	6 days 0 ₀	7 days 0 ₀	Dif. 0 ₀
Social activities									
Meeting relatives.....	29	25	- 4	67	66	- 1	4	9	+ 5
Card-playing	17	10	- 7	46	58	+12	37	32	- 5
Meeting friends.....	14	13	- 1	72	77	+ 5	14	10	- 4
Sport Matches (assist.)....	14	8	- 6	45	51	+ 6	41	41	0
Fishing, hunting (season) ..	14	14	0	44	46	+ 2	42	40	- 2
Meeting neighbours.....	9	8	- 1	58	63	+ 5	33	29	- 4
Sport.....	7	7	0	40	40	0	53	53	0
Club	4	3	- 1	39	28	-11	57	69	+12
Bowling	4	7	+ 3	16	16	0	80	77	- 3
Religious activities									
Attendance at Mass	88	85	- 3	8	10	+ 2	1	2	+ 1

1. The numbers indicated in the "difference" column show in percentage the number of people who do not indulge in the same activity at the same rhythm on Sunday when they are on holiday, and on Sunday when they are working. A negative sign affixed to "regularly" and "occasionally" indicates a drop of the activity, whereas a positive sign affixed to "never" means that there are more people who do not indulge in the activity concerned.

It will be noted in the above table that the difference in participation rates in Sunday activities is most pronounced in family activities such as going for a drive, or supervising homework. Similarly, these results would seem to indicate that there is a slight drop in attendance at mass by those engaged in continuous production as opposed to non-continuous production. This result is consistent with the findings of Sheena Findlay in the University of Toronto study referred to above.

The Allyn Commission concluded from the research obtained that continuous production generally affects the social, religious and family life of the production worker, and that he is affected even when he has the day off on Sundays. The Commission also concluded that Sunday work has, among other results, that of isolating the workers throughout their lives.

On the positive side of things, Miss Massé's research found that there are no distinctions between continuous production and non-continuous production workers in the incidence of membership in associations. This result would appear to be consistent with that found by Bernie Zaharik in the University of Toronto study. Some of the Quebec workers interviewed stated a number of advantages arising from Sunday work: increase in the number of jobs, accumulation of holidays, easier work in the mills, greater opportunity for promotion, ability to meet competition, the attraction of companies to Quebec, foreseen holidays. However, not all of the workers accepted these arguments in favour of Sunday work.

Perhaps most significant, Miss Massé's survey established that the Sunday day off holds the first place among all the working conditions proposed to the workers for appraisal, on equal terms with stable employment. The workers were nearly unanimous in recognizing the

inconveniences of Sunday work, and even admitting the advantages, the general tendency was to reject the arguments in favour of Sunday work.

Miss Massé's final conclusion to the Alleyn Commission was that the system of continuous work in that province could not be recommended from the point of view of the worker's welfare, except if there was economic necessity.

The limitations of the Alleyn Commission's study as applied to Ontario are obvious. Not only are the religious, cultural and social habits of Ontarians different in many respects, but the Quebec survey was limited to workers in only three industries in that province, all of which had a high incidence of continuous production. Nevertheless, the differences in the degree of participation in Sunday activities, particularly those related to the family, between continuous and non-continuous employees cannot be ignored.

CHAPTER 8

THE LEGAL BACKGROUND OF SUNDAY OBSERVANCE LAWS IN FORCE IN ONTARIO

S U M M A R Y

- A. SUNDAY OBSERVANCE LAWS AND THE LEGAL RIGHT TO
FREEDOM OF RELIGION
- B. THE ATTORNEY GENERAL'S PROSECUTORY DISCRETION
UNDER SECTION 16 OF THE FEDERAL LORD'S DAY ACT
- C. PROSECUTIONS UNDER THE FEDERAL LORD'S DAY ACT
 - 1. Section 4
 - 2. Section 6
 - 3. Procedural Matters
- D. "WORKS OF NECESSITY OR MERCY" UNDER THE FEDERAL
LORD'S DAY ACT
- E. THE VALIDITY OF SUNDAY CONTRACTS
- F. LEGAL AND ADMINISTRATIVE PROCEEDINGS ON SUNDAY

This chapter consists of a study and review of the interpretation by the Courts of various aspects of existing Sunday observance legislation. The constitutional jurisdiction under the distribution of legislative powers in the *British North America Act* is given separate and detailed treatment in Chapter 10 as part of our proposals and alternatives for Ontario, and will not be directly considered here except insofar as it is relevant to the discussion of the legal right to freedom of religion.

A. SUNDAY OBSERVANCE LAWS AND THE LEGAL RIGHT TO FREEDOM OF RELIGION

The question as to whether Sunday observance legislation is a denial of freedom of religion was not brought directly before the Supreme Court of Canada until 1963 in the case of *Robertson and Rosetanni v. The Queen*.¹ The alleged denial of religious freedom was said to be section 4 of the federal *Lord's Day Act*² under which Robertson and Rosetanni were charged and convicted for operating their bowling alley in the city of Hamilton on the Lord's Day. They claimed that the effect of the *Canadian Bill of Rights*,³ in particular the clause recognizing and declaring "freedom of religion",⁴ was to repeal section 4, or alternatively, to render it ineffective. The case reached the Supreme Court of Canada after appeals from the con-

¹[1963] S.C.R. 651.

²R.S.C. 1952, c. 171.

³S.C. 1960, c. 44.

⁴*Ibid.*, s. 1(c).

viction to the Ontario High Court (Schatz, J.) and the Ontario Court of Appeal had been dismissed. This was the first case to reach the Supreme Court of Canada involving an interpretation of specific sections of the 1960 *Canadian Bill of Rights*. If the accuseds' argument had been sustained, it would have wiped out one of the main operative provisions of the federal *Lord's Day Act*.

However, the Court by a four to one decision rejected this argument. The majority judgment, delivered by Mr. Justice Ritchie, held that although the *Lord's Day Act* was passed for the purpose of safeguarding the sanctity of the Lord's day, it did not abrogate, abridge or infringe "freedom of religion" as guaranteed by the Bill, for two reasons: (1) the freedoms specified in the Bill were those as they existed immediately before that statute was enacted, and complete liberty of religious thought and untrammelled affirmation of religious belief existed before the Bill, notwithstanding the *Lord's Day Act*; and (2) the practical effect of the *Lord's Day Act* on those whose religion required them to observe a day of rest other than Sunday was a purely secular and financial one in having to abstain from business on Sunday.

As evidence that religious freedom had previously existed in Canada in the eyes of the Supreme Court of Canada notwithstanding the *Lord's Day Act*, reference was made to judicial statements in two earlier cases in that Court, *Chaput v. Romain*⁵ in 1955 involving an action for damages arising out of the dispersal by the police of a religious gathering of Jehovah's Witnesses on private premises, and *Saumur v. Quebec and Attorney General for Quebec*⁶ in 1953 involving the application of a Quebec city prohibitory bylaw to the Jehovah's Witness' distribution of religious tracts in the streets. In *Chaput v. Romain*, Mr. Justice Taschereau, as he then was, speaking for himself and Chief Justice Kerwin and Mr. Justice Estey, had observed:

All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else.⁷

Then in *Saumur*, Mr. Justice Rand had described the position of religious freedom in the Canadian legal system:

From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.⁸

⁵[1955] S.C.R. 834.

⁶[1953] 2 S.C.R. 299.

⁷[1955] S.C.R. 834, at p. 840.

⁸[1953] 2 S.C.R. 299, at p. 327.

In addition to these pre-1960 judicial statements in the Supreme Court of Canada as to the nature of freedom of religion in Canada, Mr. Justice Ritchie referred with approval to the dissenting judgment of Justice Frankfurter in the United States Supreme Court in *West Virginia State Board of Education v. Barnette*:

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.⁹

While it might be suggested that the above statement of Justice Frankfurter begs the very question that was before the Court in *Robertson and Rosetanni*,¹⁰ it is clear that Mr. Justice Ritchie (for the majority) saw no conflict between "freedom of religion", as recognized and declared in the *Canadian Bill of Rights*, and section 4 of the *Lord's Day Act*.

As further support for his position, Mr. Justice Ritchie described the effect of the *Lord's Day Act* on non-Lord's day observers as "a purely secular and financial one", in some cases causing "a business inconvenience", but certainly not an abrogation, abridgement or infringement of religious freedom. This emphasis on effect rather than purpose of the *Lord's Day Act* was necessary to allow the Act to retain its federal constitutional character as criminal legislation relating to religion (i.e., to prevent profanation of the Lord's Day),¹¹ yet to avoid a direct conflict with the notion of "freedom of religion". If both purpose and effect¹² had been held to be secular and financial, the *Lord's Day Act* would have been deprived of its constitutional underpinnings under section 91(27) of the *British North America Act* and been regarded as properly the subject of provincial legislation relating to the regulation of local business and sporting facilities.¹³

⁹(1943), 319 U.S. 624, at p. 653.

¹⁰In his dissenting judgment in *Robertson and Rosetanni*, Mr. Justice Cartwright, as he then was, approved of Justice Frankfurter's sentences in the Canadian context, but noted at p. 660:

But this passage presupposes that the word "law" [in the last sentence] means a law which has a constitutionally valid purpose and effect other than the forbidding or commanding of conduct in a solely religious aspect.

Also, see Laskin, "Freedom of Religion and the Lord's Day Act—The Canadian Bill of Rights and the Sunday Bowling Case" (1964), 42 Can. Bar Rev. 147, at pp. 153-154.

¹¹See *In re Legislation Respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 583; *Ouimet v. Bazin* (1912), 46 S.C.R. 502; *Lord's Day Alliance of Canada v. Attorney General for Manitoba*, [1925] A.C. 384; *Henry Birks and Sons (Montreal) Ltd. v. Montreal and the Attorney General of Quebec*, [1955] S.C.R. 799; *Lord's Day Alliance of Canada v. Attorney General for British Columbia*, [1959] S.C.R. 497.

¹²The drawing of a distinction between purpose and effect in this case was criticized by Laskin, *op. cit. supra*, note 10, at p. 155, and by Godfrey in "Freedom of Religion and the Canadian Bill of Rights" (1964), 22 U. of T. Fac. L. Rev. 60, at pp. 72-73.

¹³This argument was raised by counsel for the appellants Robertson and Rosetanni, but was not discussed in the majority or minority judgment except through a passing reference by Mr. Justice Ritchie to primary provincial jurisdiction over the regulation of hours of labour.

The admission by the majority that the *purpose* of the legislation was to safeguard "the sanctity of the Sabbath (Sunday)" is in direct contrast with the leading cases in the United States Supreme Court where the religious purpose of state Sunday observance laws has been expressly denied.¹⁴ In *McGowan v. Maryland*,¹⁵ *Two Guys From Harrison-Allentown, Inc. v. McGinley*,¹⁶ *Braunfeld v. Brown*,¹⁷ and *Gallagher v. Crown Kosher Super Market*,¹⁸ all of which arose in 1961, attacks were launched on Sunday observance legislation in Maryland, Pennsylvania and Massachusetts. The bases for these constitutional challenges in the United States were that the Sunday laws prohibiting the opening of business establishments on that day infringed the first amendment guarantees against any establishment of religion and against abridgement of its free exercise, which guarantees were binding on the states through the due process clause of the fourteenth amendment. The U.S. Supreme Court rejected these challenges, holding that, although these laws once had their origins in religion,¹⁹ both their purpose and effect in modern times were not to aid religion but to set aside Sunday for rest and recreation as a secular matter.²⁰ Also, it was held that these laws did not impose on Orthodox Jewish sabbatarians (whose faith required them to rest on Saturday) an unconstitutional economic burden on the free exercise of their faith when they were not permitted to open their shops on Sunday to equalize their economic position. Chief Justice Warren considered this to be only an indirect burden on the exercise of religion since the religious practice of the Jewish sabbatarians was not made unlawful.²¹

The dissent of Mr. Justice Cartwright, as he then was, in *Robertson and Rosetanni* provides an interesting departure from the position of the majority in both the Canadian and United States Supreme Courts. He stated unequivocally that both the purpose and effect of the *Lord's Day Act* was to compel, under penal sanction of the criminal law, the observance of Sunday as a religious holiday by all the inhabitants of Canada, and that this was an infringement of freedom of religion. He suggested that the Act differed only in degree but not in kind from one commanding a purely religious course of conduct such as the attendance at least once at divine service in a specified church. Thus, he concluded that section 4 of the Act infringed "freedom of religion" as declared and preserved in the *Canadian Bill of Rights*, and must therefore be treated as inoperative.

However, in the later case of *Regina v. Drybones*²² in 1969, Chief Justice Cartwright (with whom Abbott and Pigeon, JJ. agreed)

¹⁴ *Robertson and Rosetanni* is compared with the recent U.S. Supreme Court decisions on state Sunday observance laws by Barron, "Sunday in North America" (1965), 42 Harv. L. Rev. 42.

¹⁵ (1961), 366 U.S. 420.

¹⁶ (1961), 366 U.S. 582.

¹⁷ (1961), 366 U.S. 599.

¹⁸ (1961), 366 U.S. 617.

¹⁹ See the judgment of Chief Justice Warren in *McGowan v. Maryland* (1961), 366 U.S. 420, at pp. 445-446.

²⁰ See Chief Justice Warren in *McGowan*, at pp. 449-452, and in *Two Guys From Harrison*, at p. 598.

²¹ See Chief Justice Warren in *Braunfeld*, at p. 606.

²² 1970 S.C.R. 282.

indicated that he had changed his mind between 1963 and 1969 respecting the effect of the *Canadian Bill of Rights* on a provision of an Act of Parliament which infringes one of the declared rights and therefore his conclusion in *Robertson and Rosetanni*, that section 4 of the *Lord's Day Act* (or any federal Act that infringed one of the declared rights, for that matter) must be treated as inoperative, was in error. However, he said nothing as to his earlier view in 1963 that section 4 of the *Lord's Day Act* infringed "freedom of religion", leaving one to assume that he still maintained this position. Mr. Justice Ritchie, who wrote the majority judgment in *Drybones* and with whom five of his brethren concurred, differed with Chief Justice Cartwright as to the application of the *Canadian Bill of Rights*, holding that a provision of the federal *Indian Act* that infringed the declared right of "equality before the law" was inoperative. However, he (Ritchie, J.) maintained his earlier position in *Robertson and Rosetanni* that section 4 of the *Lord's Day Act* did not infringe "freedom of religion" so, there being no conflict, it had not been necessary to consider the application of the Bill.

The net result of all this in 1970 is that six of the nine members of the Supreme Court of Canada uphold Mr. Justice Ritchie's position that section 4 of the *Lord's Day Act* does not infringe "freedom of religion"; yet if it did they would apply the *Canadian Bill of Rights* and declare the section inoperative. Chief Justice Cartwright did not renounce his view that the section infringed "freedom of religion", but he would not declare the section inoperative by virtue of the Bill even if the majority were to admit that it did so infringe. Mr. Justice Abbott was with the majority in *Robertson and Rosetanni* and thus would not view the section as an infringement of "freedom of religion"; but neither would he apply the Bill to declare it inoperative even if it did so infringe. Mr. Justice Pigeon has not indicated his position on the "freedom of religion" question, but he would not declare the section inoperative by applying the Bill if it did infringe in any event. Finally, while Mr. Justice Laskin in his judicial capacity has not indicated his position on either issue since his appointment, his pre-judicial writings were sympathetic to Chief Justice Cartwright's position that section 4 of the *Lord's Day Act* does infringe "freedom of religion".²³

In short, in the light of existing judicial authority, the federal *Lord's Day Act* would appear to be unaffected by "freedom of religion" as recognized and declared in the *Canadian Bill of Rights*.

As far as provincial legislation relating to Sunday is concerned, the *Canadian Bill of Rights* is of no application since it is a federal statute. However, the reasoning of the majority of the Supreme Court of Canada in *Robertson and Rosetanni* points to the conclusion that valid provincial legislation, necessarily secular in both purpose and

²³See Laskin, *op. cit. supra*, note 10, in which the author, prior to his appointment to the Ontario Court of Appeal in 1965 and to the Supreme Court of Canada in 1970, agrees with the position taken in *Robertson and Rosetanni* by Mr. Justice Cartwright in dissent, and is critical of the narrow interpretation given by the majority to the term "freedom of religion".

effect to retain its constitutional underpinnings, would be little threatened by a challenge to the effect that it was a denial of an existing common law or statutory right to "freedom of religion". But it is not always easy to deal with such matters on a speculative basis and in the abstract.

It has been a feature of Canadian constitutional law that provincial laws which impinge on fundamental rights of the individual have often been declared invalid by the Courts *not* on the basis of any statutory bill of rights or common law rights but on the basis of the exercise of legislative power being held to be *ultra vires* the provincial Legislature as an invasion of Parliament's jurisdiction. For example, the Supreme Court of Canada in 1938 in the *Alberta Press* case²⁴ held that *An Act to Ensure the Publication of Accurate News and Information* was *ultra vires* the provincial Legislature of Alberta because it interfered with the free working of the federal political institutions and was a denial of freedom of the press which could be curtailed only by Parliament. In *Union Colliery Co. of British Columbia Limited v. Byrden*,²⁵ the Judicial Committee of the Privy Council held that a provision of the *Coal Mines Regulation Act* of British Columbia which prohibited Chinamen from working in any coal mine below ground was *ultra vires* the province as a matter in relation to "naturalization and aliens" — a head of federal jurisdiction under section 91(25) of the *British North America Act* (no reference was made to any constitutional right to "equality before the law"). In *Switzman v. Elbling and Attorney-General of Quebec*,²⁶ a majority of the Supreme Court of Canada declared the *Act Respecting Communistic Propaganda* to be *ultra vires* the Legislature of Quebec because it invaded Parliament's jurisdiction over criminal law by making it an offence either to occupy a house or to publish materials for the purpose of propagating communism or bolshevism (only three out of nine judges on the Court referred to the notion of "freedom of speech" and "freedom of the press").

The "*ultra vires*" approach has been adopted in matters of religious legislation. Indeed, the Judicial Committee of the Privy Council in *Attorney General for Ontario v. Hamilton Street Railway Company*²⁷ in 1903 declared *ultra vires* the 19th century Ontario *Act to Prevent the Profanation of the Lord's Day*²⁸ because it invaded the exclusive jurisdiction of Parliament over criminal law. Quebec legislation on the same subject met a similar fate in 1912.²⁹ In *Henry Birks and Sons (Montreal) Ltd. v. Montreal and Attorney General of Quebec*³⁰ in 1955, the Supreme Court of Canada declared *ultra vires* a Montreal bylaw which attempted to enforce store closings on certain religious feast days, on the ground that it was a matter of enforcing religious observance and thus a matter of criminal law. In the *Saumur*³¹

²⁴Reference Re Alberta Statutes, [1938] S.C.R. 100. See particularly Chief Justice Duff at pp. 132-133, and Mr. Justice Cannon at pp. 145-146.

²⁵[1899] A.C. 580.

²⁶[1957] S.C.R. 285.

²⁷[1903] A.C. 524.

²⁸R.S.O. 1897, c. 246.

²⁹*Ouimet v. Bazin* (1912), 46 S.C.R. 502.

³⁰[1955] S.C.R. 799.

³¹[1953] 2 S.C.R. 299.

case referred to by the majority in *Robertson and Rosetanni*, the Court refused to apply a Quebec city bylaw to prevent the Jehovah's Witnesses from distributing their religious materials in the streets. Three of the eight members of the Court were of the view that the bylaw was *ultra vires* as being in relation to criminal law.

While the *ultra vires* approach has dominated judicial review of provincial legislation allegedly denying such fundamental rights as freedom of the press, equality before the law, freedom of speech and freedom of religion, it has not excluded another approach which recognizes certain fundamental rights as separate constitutional values which are exclusively in federal keeping. This other approach, often referred to as the "implied bill of rights",³² has been adopted on occasion in respect of "freedom of religion". For example, in the *Birks* case, Mr. Justice Kellock (with whom Locke, J. agreed) stated:

Even if it could be said that legislation of the character here in question is not properly "criminal law" within the meaning of section 91(27), it would, in my opinion, still be beyond the jurisdiction of a provincial legislature as being legislation with respect to freedom of religion dealt with by the Statute of 1852 (Can.), 14-15 Vict., c. 175.³³

The Statute of 1852 to which Mr. Justice Kellock referred was the *Rectories Act*³⁴ of the Legislature of the Province of Canada, the relevant section of which reads:

That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

This Act remained in force following Confederation by virtue of section 129 of the *British North America Act*, and was held by four out of seven judges in the *Saumur* case in 1953 to fall within federal jurisdiction.³⁵

Also in the *Birks* case, Mr. Justice Rand stated:

I cannot distinguish the prohibition here, with sanctions for non-compliance, of carrying on business on days given their special and common characteristic by church law from those of that

³²See, for example, Laskin, *Canadian Constitutional Law* (3d ed., 1967), pp. 970-976; Brewin, "A Bill of Rights Implicit in the B.N.A. Act" (1957), 35 *Can. Bar Rev.* 554; McWhinney, "Mr. Justice Rand's 'Rights of the Canadian Citizen': The Padlock Case" (1958), 4 *Wayne L. Rev.* 115; MacGuigan, "Civil Liberties in the Canadian Federation" (1966), 16 *U.N.B. L. J.* 1; and Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966-67), 12 *McGill L. J.* 497.

³³[1955] S.C.R. 799, at p. 823.

³⁴1852, 14-15 Vict., c. 175 (Can.).

³⁵The other three justices with Rand, J. were Locke, Kellock and Estey, JJ. See the analogies by Godfrey, *op. cit. supra*, note 12, at pp. 64-68.

past. It is in the same category as the law of Sunday observance.

But these considerations show equally that the statute is enacted in relation to religion; it prescribes what is in essence a religious obligation. We are asked to find that the purpose of the legislation was either to give ease from labour to employees or to prevent the sale of goods as a measure of regulating local trade and commerce; but I regretfully find myself unable to treat either of these contentions as having the slightest basis or support in any pertinent consideration. In this aspect, for the reasons given by me in the case of *Saumur v. City of Quebec*, as legislation in relation to religion the provision is beyond provincial authority to enact.³⁶

In *Saumur*, Mr. Justice Rand was with the majority of the nine-man Court in holding that a prohibitory Quebec city bylaw did not apply to the Jehovah's Witness' distribution of religious tracts in the street. Yet he was in the minority (with Locke, Kellock and Estey, JJ.) in denying provincial capacity to enact legislation abrogating religious freedom:

The only powers given by sec. 92 of the *Confederation Act* which have been suggested to extend to legislation in relation to religion are nos. 13, Property and Civil Rights, and 16, Matters of a merely local or private nature in the Province. . . .

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumspection of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside the periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.

That legislation "in relation" to religion and its profession is not a local or private matter would seem to me to be self-evident: the dimensions of the interest are nation-wide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs

³⁶ 1955 S.C.R. 799, at pp. 813-814.

and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive.³⁷

In the recent case of *Walter v. Attorney General of Alberta*,³⁸ the Supreme Court of Canada was required to consider the argument that the Alberta *Communal Property Act* was an unconstitutional provincial denial of freedom of religion in the sense that it was aimed at preventing the spread of Hutterite colonies in Alberta, the maintenance of which was a cardinal tenet of the Hutterite religion. The judgment of the Court, delivered by Mr. Justice Martland, distinguished *Saumur* on its facts, and after referring to the views of Kellock, Locke and Rand, J.J. in *Birks* on the subject of freedom of religion, rejected the argument on the ground that while the legislation limited the territorial area of communal land held and controlled the acquisition of land by new colonies, it did not prohibit the existence of such colonies nor the holding of land by them. Thus, it was not legislation in relation to religion. Even if "freedom of religion" (as an independent constitutional value) was beyond the power of the provincial Legislature, the Court held that this only involved freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship, and did not mean freedom from compliance with provincial legislation in relation to property holding.

The latter reconciliation of the provincial statute with the notion of freedom of religion is not dissimilar from that of the majority in *Robertson and Rosetanni* where freedom of religion was interpreted as "freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma". In both cases, the Court implied that they would include in the definition of freedom of religion the very laws they were being asked to construe, one in the provincial context and the other in the federal context. This represents a more restrictive approach to freedom of religion than followed by Rand, Kellock, Locke and Estey, J.J. in *Saumur* and *Birks* in the previous decade.

Two County Court judgments deserve reference in this discussion of freedom of religion and provincial laws allegedly denying it. In *Regina ex rel. Nutland v. McKay*,³⁹ a provision in the *Fair Accommodation Practices Act*⁴⁰ of 1954 which attempted to ensure that accommodation and services in places of business were available to everyone, without regard to race, *creed*, colour, nationality, ancestry or place of origin, was challenged as to its constitutional validity. Judge Lang of the Kent County Court rejected an argument that the inclusion of the word "creed" meant the section was in relation to religious freedom and thus *ultra vires* the province on the strength of the *Saumur* and *Birks* cases, and held that the section "neither

³⁷[1953] 2 S.C.R. 299, at p. 329.

³⁸[1969] S.C.R. 383.

³⁹(1956), 5 D.L.R. (2d) 403.

⁴⁰S.O. 1954, c. 28.

enlarges, confirms, nor restricts religious liberty or the right to worship as one chooses".

Then in *Regina v. Harrold*⁴¹ decided on September 10, 1970, Judge Darling of the County Court of Vancouver was required to determine the constitutional validity of the application of a Vancouver anti-noise bylaw to adherents of Krishna Consciousness who, in accordance with their religious tenets, would go forth into the downtown streets of Vancouver during business hours "chanting their transcendental sounds to the accompaniment of a small drum and two or three cymbals . . . bringing their sublime message to the peoples of the city so that they too would benefit from the religious experience and achieve peace and serenity". In refusing to apply the bylaw, Judge Darling reasoned that the case was within the realm of religious freedom and subject only to the strictures of federal legislation through the criminal law. In so holding, he relied on *Saumur* and *Birks*; the portion of the preamble to the *British North America Act* which reads "a Constitution similar in principle to that of the United Kingdom"; the series of cases which have been described as the "implied bill of rights" cases: *Switzman v. Elbling*, *McKay v. The Queen*,⁴² *Poole v. Tomlinson*,⁴³ *District Corporation of Kent v. Storgoff*,⁴⁴ and *Regina v. Beattie*,⁴⁵ and finally an 1884 Quebec case, *City of Montreal v. Madden*⁴⁶ in which De Montigny, J. dismissed a charge under an anti-noise bylaw against a member of the Salvation Army who had allegedly created excess noise by chanting hymns and playing tambourines.

In summary, provincial legislation which is primarily religious in either purpose or effect would not likely be sustained by the Courts in Canada. The main ground, however, upon which the Courts have relied is not any common law or statutory right of the individual to "freedom of religion", but the recognition of religious freedom as a subject of federal criminal jurisdiction and thus *ultra vires* the provincial Legislatures. The *Saumur* and *Birks* cases have provided some restrictions on provincial law-making based on religious freedom as a separate constitutional value but, as demonstrated in the *Walter* case, these restrictions are somewhat limited in scope. As long as there is a dominant secular provincial aspect to the legislation, then the Courts will likely sustain its constitutional validity notwithstanding any incidental or indirect effect on religious freedom.

Whether provincial secular legislation relating to Sunday observance can be sustained without invading Parliament's jurisdiction over criminal law is the key constitutional question.

It will be discussed in detail in Chapter 10.

⁴¹ Unreported as at December 1, 1970.

⁴² [1965] S.C.R. 798.

⁴³ (1957), 21 W.W.R. 511.

⁴⁴ (1963), 41 W.W.R. 301.

⁴⁵ [1967] 2 O.R. 488.

⁴⁶ (1884), 29 Lower Canada Jurist 134 (Montreal Recorder's Court).

B. THE ATTORNEY GENERAL'S PROSECUTORY DISCRETION UNDER
SECTION 16 OF THE FEDERAL LORD'S DAY ACT

This section requires the provincial Attorney General (and since 1948 his lawful Deputy) to give consent before a prosecution can be commenced for a violation of the federal *Lord's Day Act*. It was included in the original Act of 1906 to prevent the Act from being used as an instrument of persecution and harassment.⁴⁷

The prosecutory discretion was described in 1947 by Mr. Justice Gale, as he then was, in *Rex v. Icelandia Limited*,⁴⁸ in these words:

The granting or withholding of the leave by the Attorney-General is a quasi-judicial function and obviously s. 16 was inserted as an important protection for persons who might be charged indiscriminately under the Act.⁴⁹

Later in the same case (which involved the prosecution and conviction of an operator of a hockey rink open for practices on Sunday), Mr. Justice Gale noted:

During the course of argument, many apparent violations such as radio contests and golf games on Sundays were discussed, but it is not helpful to speculate as to why they are allowed to thrive unmolested by those whose duty it is to enforce the provisions of the Act. It may well be that successive Attorneys-General, realizing the possible implications, have wisely declined to grant leave for the initiation of proceedings in respect of those matters.⁵⁰

The present Attorney General for Ontario, Hon. A. A. Wishart, discussed the nature of section 16 in the Legislature in 1969:

The criteria generally is public demand. There is an option in the Act for the Attorney General, designed, I think at least in large part, to permit perhaps a different approach to the enforcement of Sunday law, the observance of Sunday, in different areas of this vast province. The Act was designed for all Canada, very different areas, and very different attitudes. The option, I think, was there in order that the Attorney General might exercise his judgment in line with public opinion so far as he could gather it.⁵¹

Other than the statements by Mr. Justice Gale above, the substantive purpose of section 16 has not been given an interpretation in reported Court decisions in Canada. However there have been a number of cases concerned with the procedural aspects of granting leave to prosecute under the Act.

⁴⁷See the statement by Prime Minister Laurier in the House of Commons in 1906, 77 H.C.Deb. (Can.), at cols. 7687-7688; also the statement in the Senate by Senator Kerr, Sen. Deb. (Can.) 1106, at p. 1201.

⁴⁸[1947] O.R. 761.

⁴⁹*Ibid.*, at p. 768.

⁵⁰*Ibid.*, at p. 774.

⁵¹Legislature of Ontario, Debates, October 21, 1969, p. 7332.

For example, in 1907 in *Rex v. C.P.R.*,⁵² the Supreme Court of the Northwest Territories held that the leave required by section 16 is a condition precedent to the commencement of a prosecution and that a conviction registered by a magistrate who had no notice of the leave was liable to be quashed. This decision was distinguished in *Rex v. Thompson*⁵³ in 1913, however, wherein the Supreme Court of Alberta held that it was not essential that the Attorney General's leave authorizing the prosecution be put in evidence as part of the case for the prosecution, as long as the accused is given an opportunity to raise the insufficiency of the consent in defence. Mr. Justice Stuart said that in the *C.P.R.* case, the Court based its decision on the fact that there had been *no* communication to the magistrate of the leave, not on the insufficiency of the form of the communication.

It was also held in *Thompson* that leave, signed by a member of the provincial Executive Council as "Acting Attorney-General" was valid and that his authority need not be shown since it could be presumed that he was properly appointed to act in such capacity.

In 1948 section 16 was amended so as to permit leave by fiat to be granted by both the Attorney General *or his lawful Deputy*.⁵⁴

The *form* of the Attorney General's leave was challenged in the Alberta case of *Regina v. Goett*⁵⁵ in 1960. There, it was held by Mr. Justice Riley, relying on Stuart, J. in *Thompson*, that the prosecution can be required to prove the document, including the signature of the Attorney General or his lawful Deputy, but that there is no requirement that the leave be either annexed to the information or complaint, or put in evidence as part of the case for the prosecution. Indeed, his Lordship stated that the leave of the Attorney General or his lawful Deputy could be an oral one and need not be in writing. However, in that case the prosecution was unable to prove the leave, once challenged, and accordingly, an order for prohibition was issued against further prosecution of the accused.

In a case arising in Manitoba at about the same time as the *Goett* case, similar considerations came before Mr. Justice Bastin in the Court of Queen's Bench in *Stone Productions Ltd. v. Garton*.⁵⁶ This was an application for an order of prohibition on the basis of certain alleged defects in the leave to prosecute granted by the Attorney General. The leave, which was filed by the prosecution, was in the form of a letter addressed to the Chief Constable in Winnipeg and signed by the Attorney General. The accused argued that the person to whom the consent was addressed (i.e., the Chief Constable) should be the one who prosecuted. The Court rejected this argument, stating that the enforcement of the *Lord's Day Act* was not to be confined necessarily to some "aggrieved" person, and that enforcement of the criminal legislation was a peculiar responsibility of

⁵²(1907), 12 C.C.C. 549.

⁵³(1913), 14 D.L.R. 175 (Alta. S.C.)

⁵⁴S.C. 1948, c. 58.

⁵⁵(1960), 31 W.W.R. 226.

⁵⁶(1960), 31 W.W.R. 380.

the police. The second argument of the accused was as to the contents of the leave, particularly the name of the person initiating the complaint. The Court rejected this argument, holding that the leave need not have named the informant. It was concluded that the leave was properly delivered to the person responsible for law enforcement in the area, and that all the Court needed to establish jurisdiction was that the Attorney General had consented to the prosecution of the particular violation of the Act charged.

Finally, further reference should be made to *Rex v. Icelandia Ltd.*⁵⁷ Counsel for the accused argued that the complainant had failed to satisfy the onus of proving that leave to prosecute had been given to him by the Attorney General. It was held by Mr. Justice Gale that, consistent with the *Thompson* case and others, while a magistrate before whom an accused appears for trial under the Act may assume that the summons was properly issued and that if nothing is said about the leave the prosecution will not fail merely because there is no evidence touching the matter, the accused can put the prosecution to the proof of the leave before the magistrate.

In Chapter 17, we will comment on the feasibility of permitting prosecutory discretion in relation to Sunday laws and on the practical manner in which such discretion has been exercised to date under section 16 in Ontario.

C. PROSECUTIONS UNDER SECTIONS 4 AND 6 OF THE FEDERAL LORD'S DAY ACT

There are surprisingly few cases reported in which the Courts have been required to interpret the prohibitive sections of the federal *Lord's Day Act*. Virtually all the reported decisions have involved prosecutions under either section 4 or section 6. The other prohibitive sections (7-10) do not appear to have given rise to the same difficulties of interpretation, as evidenced by the dearth of reported decisions on them.

In considering the prohibitions in sections 4 and 6, it should be kept in mind that both sections contain the phrase "... except as provided herein or in any provincial Act or law now or hereafter in force ...". Therefore these prohibitions are limited both by the "works of necessity or mercy" in section 11 (to be discussed in the next part of this chapter) and by any provincial laws which may choose to permit activities which would otherwise be prohibited.

1. Section 4

This section makes it unlawful on the Lord's day (1) to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate; or (2) to carry on or transact any business of [a person's] ordinary calling, or in connection with such calling; or (3) for gain to do, or employ any other person to do, on that day, any work, business, or labour.

⁵⁷[1947] O.R. 761.

The case giving the greatest insight into some of the difficulties with this section is *Gordon v. The Queen*,⁵⁸ a 1961 decision of the Supreme Court of Canada. The accused was charged with carrying on business on Sunday, contrary to section 4, in that he operated two automatic laundry establishments on the Lord's day. The premises in question contained washing machines and driers which customers could operate automatically by inserting a coin in the slot. The soap and bleach were supplied by the customers but the water and electricity were furnished by the accused. While neither the accused nor his employees were present on the Sunday in question, there was a sign on the wall with instructions as to the operation of the machines and another sign giving telephone numbers to be called in case of emergency. The conviction of the accused was upheld by eight members of the nine-man Court, Cartwright, J. dissenting. The main issue in the case involved an interpretation of section 4⁵⁹ and the argument by the accused that he was not a person who carried on or transacted any business "of his ordinary calling" on Sunday. The judgment of Chief Justice Kerwin, on behalf of himself and six of his brethren, rejected this argument, holding that the words of section 4 were very wide, and that even in the physical absence of the accused or his employees, he was carrying on business on the Sunday in question and did not have to be physically present to violate the Act. Four members of the Court, Locke, Martland, Judson and Ritchie, JJ., in a judgment delivered by Mr. Justice Locke, stated that the situation was analogous to one where a proprietor of a self-service grocery store left his premises open and unattended on Sunday; the presence or absence of the proprietor or his employees was an irrelevant circumstance.

Mr. Justice Cartwright, in dissent, held that the *Lord's Day Act* was intended to prevent people from working Sundays, and for the accused to come within the words "carry on business" there must have been some act of a positive nature or the doing of something. He concluded that section 4 made the doing of some act on Sunday an essential ingredient of an offence against the section. In the case at bar, there was nothing done by the accused or his employees in connection with the business, and therefore, in his Lordship's view, he was entitled to an acquittal.

The two *Bol-O-Drome* cases in Ontario in 1943 and 1944, respectively, provide an interesting contrast as to what business activities will or will not be deemed by the Courts to be part of a person's "ordinary calling". In the first case,⁶⁰ the accused, an incorporated company having among its objects the conduct of bowling alleys, had

⁵⁸[1961] S.C.R. 502.

⁵⁹It should be noted that the accused in this case had not adduced evidence or made the argument before the trial judge that he was carrying on a work of necessity or mercy within the meaning of section 11 of the *Lord's Day Act*. Therefore the Supreme Court of Canada was not able to consider section 11. However, there are decisions holding that coin-operated laundries and car washes are exempted as works of necessity or mercy: see *Regina v. Coin Launder Launder-All Limited* (1960), 31 W.W.R. 262 (Buchanan, C.J.D.C., Alta.), and *Regina v. Mueller* (1966), 55 W.W.R. 245 (Turcotte, D.C.J., Alta.).

⁶⁰*Regina v. Bol-O-Drome Ltd.* (1943), 80 C.C.C. 82.

leased its bowling alleys to another incorporated association for use on Sunday in return for a share of the receipts of Sunday bowling. It was held in the Carleton County Court that this constituted a violation of section 4 of the Act because the evidence showed that the arrangement was part of the scheme to endeavour to circumvent the law and the incorporated association was really an alias of or an agent of the accused. Even apart from the principles of agency, the relationship between the two entities was a violation of section 4. A key factor in the case was the evidence that the accused was making a profit by reason of Sunday bowling, and the Court could see virtually no distinction between charging a fee for bowling during the week and renting the premises on Sunday for a profit.

In the second *Bol-O-Drome Co. Ltd.* case,⁶¹ the same company tried a similar arrangement with a *bona fide* recreational association which was non-profit making. But here there was a leasing arrangement for Sunday use of the facilities extending over seven months at a monthly rate. Mr. Justice Greene in the Supreme Court of Ontario directed a verdict of acquittal, and in so doing appeared to depart from the rationale in the first *Bol-O-Drome* case. He stated that renting the premises on Sunday for a profit did not necessarily mean conducting bowling alleys as the ordinary calling of the accused such as to constitute a violation of section 4. Essentially, he was of the view that the renting of business premises on Sunday did not necessarily mean that the lessor was transacting business in connection with his ordinary calling, even if similar business was conducted on the premises on a Sunday. Since it would not have been a violation of the Act for the accused to have rented its premises for seven days a week for the full seven months, he concluded that there was no offence committed for renting only on Sundays. Two major items of evidence in the case were that the lessee had complete control of the premises on Sunday and also was a non-profit association.

A case involving section 4 arose ingeniously in an application for *certiorari* in *Re Warner and Manitoba Labour Board*⁶² in 1960. An employer was seeking to set aside a certification order of the Manitoba Labour Board on the ground that the application was authorized by the members of the local union involved at a meeting held on a Sunday. The employer argued that the authorization for such certification was a nullity by virtue of section 4 of the *Lord's Day Act* since the trade union local was carrying on "business" of its ordinary calling. Mr. Justice Williams, as he then was, rejected this argument, suggesting that "business" was "a word of large and indefinite import", meaning "something which is followed and which occupies time and attention and labour for profit". He concluded that the union members on the Sunday in question were not on the business of their ordinary calling, or carrying on business at all.

2. Section 6

Subsection 1 makes it unlawful on the Lord's day (1) to engage in any public game or contest for gain, or for any prize or reward;

⁶¹*Regina v. Bol-O-Drome Co. Ltd.* (1944), 82 C.C.C. 161.

⁶²(1960), 31 W.W.R. 613 (Man. Q.B.).

or (2) to be present thereat; or (3) to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

Subsection 2 in effect deems any transportation charge to the location of any performance to be an indirect payment of a fee for admission to such performance.

The leading case interpreting this section is *Winnipeg Film Society v. The Queen*,⁶³ in the Supreme Court of Canada in 1964. The accused was a non-profit film society which provided its dues-paying members with showings of special films in a theatre on Sunday. No fee of any kind was charged to anyone at the performance, but the members paid annual dues which varied from year to year. In the year prior to the offence taking place, annual dues were \$6.00. This sum entitled members not only to attend the showing of the society's films but to participate in other affairs of the organization. On an appeal from a conviction under section 6 of the *Lord's Day Act*, Mr. Justice Ritchie, on behalf of the five-man Court, held that the words of section 6(1) were clearly open to an interpretation which could be construed in the appellant's favour. The charging of the fee directly or indirectly *at the performance* was an essential ingredient of the offence. In the case at bar, the annual fee paid by the members was not an indirect device to disguise an admission fee but rather had the character of a membership fee entitling a person to participate in the affairs of the society generally. It bore no relationship to the number of performances actually attended by individual members. Therefore, any such performance would not be one *at which* any kind of fee was charged directly or indirectly.

In two separate cases, proprietors have unsuccessfully attempted to avoid section 6 by combining a permitted activity (i.e., the supply of food and drink) with a prohibited activity (i.e., the provision of musical entertainment and dancing). The most recent of these cases was *Johnson v. Jay-Marc Enterprises Ltd.*⁶⁴ in Saskatchewan in 1965. The accused was operating a coffee house called "The Fourth Dimension" in Regina. It opened each night, including Sundays, at 8 p.m., and some form of entertainment usually began about 9 p.m., and was repeated periodically until about 11.45 p.m. Professional singers and instrumentalists were usually hired for weekdays, but Sunday was "hootenany" night which featured community singing and volunteers from the audience. While no admission fee was charged, each person attending was charged 25 cents per hour payable when he left. In addition, there was an opportunity to buy food but it was not compulsory. In upholding the conviction of the accused, Mr. Justice Brownridge (for the three-man Court of Appeal) admitted that the accused was lawfully entitled to serve food and drink on Sunday for a fee, but that the musical performance, for which a charge of 25 cents per person per hour was made, was clearly

⁶³(1964), 44 D.L.R. (2d) 126 (S.C.C.).

⁶⁴(1965), 53 W.W.R. 436 (Sask. C.A.).

prohibited by section 6 since it was something quite separate and distinct from the food and drink. The Court distinguished the *Winnipeg Film Society* case on the basis of the annual membership fee in that case where the essential ingredient of the charging of a fee directly or indirectly *at the performance* was lacking. In the case at bar, the indirect fee was payable *at the performance*, so the offence was proved.

The other case similar to *Jay-Marc* was *Recreation Operators Limited v. The Queen*,⁶⁵ in the Ontario Court of Appeal in 1953. There, the accused sponsored a performance on Sunday of music and entertainment by singers and comedians and charged admission to the hall by means of a "food check" costing 75 cents. During the course of the performance, a luncheon consisting of three sandwiches, a piece of cake and a soft drink was served to all persons present in the hall. Mr. Justice Hogg (for the three-man Court of Appeal) sustained the conviction of the accused on the basis of the entertainment business being separate and distinct from the food business:

The circumstances of the present case show, in my opinion, that the true and legitimate business of the appellant company is not in furnishing food and drink on Sunday to those who pay a fee to enter the arena but is in providing a performance or entertainment on Sunday. To put the matter in another form, if the appellant is engaged in the business of furnishing food and drink on Sunday night, it is also engaged, on the same night, in the business of providing a performance or entertainment and this latter business is prohibited by the statute.⁶⁶

3. *Procedural Matters*

In *C.B.C. v. Attorney General for Ontario*,⁶⁷ the Supreme Court of Canada held by a four to three decision that the Canadian Broadcasting Corporation, as an agent of Her Majesty, was not bound by the federal *Lord's Day Act* and was therefore immune from prosecution under section 4 for operating a broadcasting station on Sunday. The majority based its decision on the ground that the word "person", as defined in the *Criminal Code* and incorporated in *Lord's Day Act* by section 2(d), could not include the Crown or its agent since this would be repugnant to the principle of Crown immunity.

The same result as in the *C.B.C.* case would likely obtain for the Crown or its agent in the right of the province, i.e., they would not be bound in the absence of express statutory language to the contrary.

With respect to enforcement, the only penalties open to the prosecution are the fines in sections 12-14 of the Act. In *Attorney General for Ontario v. Niagara Falls Tramway Co.*,⁶⁸ it was held in

⁶⁵[1953] O.W.N. 28 (C.A.).

⁶⁶*Ibid.*, at p. 30.

⁶⁷[1959] S.C.R. 188.

⁶⁸(1891), 18 O.A.R. 453.

1891 that an injunction would not be granted at the suit of the Crown to enforce the provincial Sunday observance legislation in force in Ontario at that time. This decision would appear to preclude such a penalty under the federal *Lord's Day Act*.

Finally, it should be noted that section 15 of the *Lord's Day Act* affirms the possible co-existence of alternative prosecutions for the same conduct:

... and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act or law, the offender may be proceeded against either under the provisions of this Act or under the provisions of any other Act or law applicable to the offence charged.

This section would be relevant today in Ontario in the event of conduct which was both a violation of express limits in a municipal enabling bylaw under *The Lord's Day (Ontario) Act* (which can specify fines of up to \$300)⁶⁹ and sections 4 or 6 of the federal *Lord's Day Act*. While there is no judicial authority to this effect, it would appear on the wording of section 15 that the Crown prosecutor would have to elect under which law, the federal statute or the municipal bylaw, he would proceed.

D. "WORKS OF NECESSITY OR MERCY" UNDER THE FEDERAL LORD'S DAY ACT

Section 11 exempts "any work of necessity or mercy" from the prohibitions in sections 4 and 6-10 of the Act, and lists twenty-four examples of classes of work which would be included in that term (but qualified by the phrase "not so as to restrict the ordinary meaning of the expression 'work of necessity or mercy'").

Many of the reported cases involving prosecutions under sections 4 and 6 have involved an interpretation of section 11, as pleaded in defence. The case analyses which follow provide a review of the judicial response to this section throughout Canada.

The expression "any work of necessity or mercy" has generally been interpreted as having a broad meaning. Indeed, the list of twenty-four examples has been held to expand rather than restrict the general expression. The leading authority would appear to be the decision of the Alberta Court of Appeal in *Rex v. Cummings*⁷⁰ wherein it was held that the list is to be taken as a guide to deciding whether other things not expressly included are within the general exception contemplated by the expression "work of necessity or mercy".

The cases relating to various aspects of transportation on Sunday are illustrative of the liberal construction given to section 11 by the

⁶⁹S.O. 1960-61, c. 50, s. 4; amended by S.O. 1965, c. 66, s. 1.

⁷⁰[1925] 1 D.L.R. 1126.

Courts. In *Cummings*, two persons were charged under the *Lord's Day Act* for selling gasoline on Sunday, one from a garage and the other from a service station. In dismissing the appeal (by a three to two decision of the five-man Court) from the acquittal of both accused, Mr. Justice Stuart reasoned that if Parliament by section 11(o) had expressly declined to prohibit "the hiring of horses and carriages or small boats for the personal use of the hirer or his family for any purpose not prohibited by this Act", and since an automobile was "a carriage", it was therefore legal to hire an automobile from the garage for the purpose of an afternoon drive for pleasure, and this would include the supply of gas for such hiring. If Parliament, therefore, has said it is legal to furnish motive power to take a pleasure drive on Sundays, this is little different from the sale of gasoline on Sunday. The general term "work of necessity or mercy" is not to be limited to physical labour as distinguished from the sale of goods and chattels. It includes both (e.g., section 11(b) includes "sale of drugs"). Also, the "necessity" of a permitted activity is in many cases not that of the person doing the work, but of the person for whom the work is done. Section 11, without the illustrative examples, might not support the sale of gasoline on Sunday as a permitted activity. But the elaborate illustrations give it a broader meaning. In particular, section 11(o) provides a close and obvious analogy to the sale of gasoline. Therefore, Mr. Justice Stuart held that it should be treated as a permitted activity.

In *Regina v. Pacific Inland Express Limited*,⁷¹ the same Court in 1959 was required to consider appeals from two convictions of a transport company for running their tractor-trailer units on the highway on Sunday. One of the units in question was in transit between Winnipeg and Vancouver, and the other between Winnipeg and Calgary. The Court allowed the appeals in each case and directed acquittals. After referring to sub-sections (g), (h), (i) and (x) of section 11, Mr. Justice Macdonald, for the Court, referred to the broad interpretation given to the section in the *Cummings* case and stated that it was a matter of public knowledge that a substantial portion of interprovincial freight was carried by trucks, quite unlike the freight transportation situation as it existed in 1906 when the *Lord's Day Act* was first passed. In the light of section 11(h) ("the continuance to their destination of trains and vessels in transit when the Lord's Day begins, and work incidental thereto"), his Lordship was able to conclude that there was no difference in principle between goods transported on a railway (expressly allowed by section 11(h)) and those transported on a highway. Therefore, he held (without deciding whether the trucks in question were "trains") that trucks in transit when the Lord's day begins were "works of necessity". In interpreting section 11, he relied on the approach taken by Mr. Justice Beck in the earlier case of *Rex v. Kent*⁷² which had also been referred to in *Cummings*,⁷³ stated as follows:

⁷¹(1959), 27 W.W.R. 588 (Alta. C.A.).

⁷²[1925] 1 D.L.R. 1117, at pp. 1122-23.

⁷³[1925] 1 D.L.R. 1126, at p. 1132.

I think it necessary first to propound and emphasize a canon of interpretation to be applied to this Act; one which is of the greatest importance — one which is fundamental and one which it seems to me is not often enough explicitly recognized and declared although undoubtedly implicitly, even if often unconsciously, applied in the interpretation of modern statutes. This canon of interpretation is expressly stated in the *Interpretation Acts* of the Dominion and probably of all the provinces of Canada in the following words:

“The law [i.e., the statute law] shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense (and *a fortiori* in the future tense), the same shall be applied *to the circumstances as they arise*, so that effect may be given to each Act and every part thereof, according to the *spirit*, true intent and meaning.”⁷⁴

A similar case occurred in Ontario in *Regina v. Zavitz Bros. Ltd.*,⁷⁵ in which the accused was convicted of operating its trailer-transport units on Ontario highways on a Sunday. The accused operated a transport business with headquarters in Welland County. On the two instances in question, trailer transports were carrying a load of bananas from Baltimore, Maryland to Toronto on Sunday, having left on Saturday evening. The evidence disclosed that bananas were perishable goods and while in transit had to be kept at a temperature of between 55 and 60 degrees. This temperature was maintained by means of a heating system and a cooling system, and to operate these systems the motors of the truck had to be kept going. It was also disclosed that bananas in trucks deteriorate even though being kept at the temperature of between 55 and 60 degrees. After referring to sub-sections (h) and (m) of section 11, of the federal Act, Judge Fuller in the Welland County Court allowed the appeals from the convictions on the basis of the law stated in *Pacific Inland Express*.

Perhaps the furthest the Courts have gone in stretching the meaning of the term “work of necessity or mercy” in the transportation context was in *Regina v. Mueller*⁷⁶ which was an appeal in 1966 in a District Court of Alberta from a conviction by a magistrate for conducting a coin-operated car wash on Sunday, contrary to the *Lord's Day Act*. The premises in question consisted of a self-service operation in which the owner of a vehicle to be washed deposited 25 cents in a coin receptacle and pushed buttons. The business was operated from 8 a.m. to 10 p.m. every day including Sundays, and the business ran itself except for some maintenance which the owner usually did in the evenings. The owner was also present on occasion on busy weekends to show new customers how to select the right push-buttons and to keep the premises clean. There was also evidence to the effect that the existence of a nitro-chemical plant near the place in question made the washing of cars a necessity

⁷⁴(1959), 27 W.W.R. 588, at p. 592.

⁷⁵[1961] O.W.N. 247 (C.C.).

⁷⁶(1966), 55 W.W.R. 245.

to preserve car paint. Judge Turcotte stated that since the majority in *Cummings* had acquitted the accused who operated a service depot which included the selling of gasoline, oil, washes, polishers, anti-freeze, etc., there was no logical reason why in this day of specialization a separate business set up for the washing of cars by the owners themselves should not be lawful as well. Therefore, he was able to extend the analogy relied on by Stuart, J.A. in *Cummings* wherein the purchase of gasoline for modern automobiles had been compared with the hiring of horses and carriages in the old days, to the case at bar where the modern Sunday driver was entitled to clean and shine his motor-car in a manner analogous to the owner of the family carriage who in earlier days would see to it that the horses would be curried properly and the carriage clean and shining. In this fashion, he was able to rely on section 11(o) as providing a sufficient analogy to include the operation of a coin-operated car wash within the exception to the general prohibition.

A recent transportation case in Quebec might be indicative of a moving away in that province from the broad interpretation given to section 11 in *Cummings*. In *Regina v. Maislin Bros. Transport Ltd.*,⁷⁷ the accused was charged under the *Lord's Day Act* when one of its trucks, having left New Jersey on a Saturday evening, was stopped on a Quebec highway on Sunday morning. The vehicle consisted of a transport trailer loaded with general merchandise. The accused was acquitted at trial and on the appeal by the Crown to the Superior District Court, on the ground that the provisions of section 11(h) of the *Lord's Day Act* were wide enough to exempt it since the truck could transport the same merchandise as was carried by a railway car. However, the Quebec Court of Queen's Bench (Appeal Side) allowed the Crown's appeal and registered a conviction (Owen, J. dissenting). Mr. Justice Choquette, speaking for himself and Mr. Justice Taschereau, refused to follow *Pacific Inland Express* and stated that section 11(h) did not apply to trucks since it recognized only two specific forms of transportation, namely trains and vessels. He then stated that if sub-section (h) were intended to include trucks, then the accused could run all his trucks on Sunday by dispatching them on Saturday evening to distant points or by recalling them from those points on the same evening. His Lordship pointed out that while the accused could have adduced evidence to show that a real necessity obliged it to run its truck on a Sunday because of a situation which it did not itself bring about, no such evidence was ever produced.⁷⁸ Mr. Justice Owen, in dissent, agreed with the decision in *Pacific Inland Express*, and the general words "work of necessity or mercy" being given a broad interpretation.

A British Columbia decision in 1949 also refused to go along with the broad interpretation given to section 11 in *Cummings* and *Pacific Inland Express*. In *Rex v. Johnson*,⁷⁹ Mr. Justice Wood in the

⁷⁷(1969), 5 D.L.R. (3d) 646.

⁷⁸It should be noted that Parliament amended section 11(x), effective September 19, 1967, exempting any work that the Canadian Transport Commission deems necessary to permit in connection with freight traffic "of any transportation undertaking". However, the amendment was made after the date of the offence so was of no consequence to the accused.

⁷⁹(1949), 8 C.R. 365 (B.C.).

Supreme Court of British Columbia held that the sale of gasoline on Sunday in that province was not a "work of necessity or mercy". His Lordship expressly refused to follow the *Cummings* line of cases.

A number of cases involving the sale of food, drink or sundries on Sunday provide somewhat indefinite guidelines as to what items will be permitted to be sold for reasons of "necessity or mercy". For example, it was held in both the early Ontario case of *Rex v. Wells*⁸⁰ and the Prince Edward Island case of *Georges v. City of Charlottetown*⁸¹ that the preparation and service of food and drink on Sunday is an act of necessity and therefore within the exemption, as long as the food and drink is consumed on the premises. However, in *Rex v. Kent*,⁸² the Alberta Court of Appeal held that the sale of apples and candy was not a "work of necessity or mercy", although Mr. Justice Stuart (with whom Mr. Justice Clarke concurred) distinguished this from keeping eating houses open to the public on Sunday where eatables were not carried away from the premises and consumed elsewhere. In *Rex v. Bortnick*,⁸³ the Manitoba Court of Appeal held that the sale of milk by a grocer for domestic use came within the exception of section 11, but that the sale of groceries did not. The sale of toothbrushes, toothpaste, magazines and records on Sunday was recently held to be not "a work of necessity or mercy" within section 11(b) by an Alberta Court in *Regina v. Sunalta Drugs Ltd.*⁸⁴ In *Rex v. Ninos*,⁸⁵ Judge O'Hearn, a Nova Scotia County Court Judge, held that the sale of bananas and a bottle of root beer on Sunday was an "act of necessity or mercy" but the sale of cigarettes was not. In the case of the bananas and root beer, His Honour reasoned that "if one is hungry or thirsty on Sunday, it is not reasonable to expect that the satisfaction thereof is to be postponed until Monday". In the case of cigarettes, it was, in his view, more reasonable to postpone the purchase until Monday.

The "food, drink and sundries" cases have also given rise to conflicting judicial views as to whether the "necessity or mercy" is to be that of the seller, the purchaser or both in considering the sale of particular items. In the *Wells* case, Mr. Justice Middleton suggested it was the necessity of the seller which was the concern of the statute:

In other words, what the legislature has in mind is that the merchant or a tradesman might in some case of necessity be compelled to practise his calling, but that must be his necessity, and not the desire or need of the purchaser. Circumstances might arise in which the merchant might, as an act of mercy towards the one in need, do that which would bring him within the Act; this necessity of the purchaser would justify the conduct of the merchant as an act of mercy.⁸⁶

⁸⁰(1911), 24 O.L.R. 77.

⁸¹[1932] 2 D.L.R. 443.

⁸²[1925] 1 D.L.R. 1117 (Alta. C.A.).

⁸³(1937), 69 C.C.C. 309 (Man. C.A.).

⁸⁴(1964), 1 C.C.C. (n.s.) 286 (Alta. S.C.).

⁸⁵(1928), 50 C.C.C. 155 (N.S.C.C.).

⁸⁶(1911), 24 O.L.R. 77, at p. 83.

The legislation with which Mr. Justice Middleton was concerned was not section 11 of the federal *Lord's Day Act*, but the pre-Confederation legislation⁸⁷ which had continued in force in Ontario by virtue of section 129 of the *British North America Act*. This earlier legislation used the term "...other works of necessity and works of charity". However, this emphasis on the seller by Mr. Justice Middleton was followed by the Manitoba Court of Appeal in *Bortnick* in respect of section 11 of the federal *Lord's Day Act*. It had been argued by the accused in that case that many of the other items in his shop were for persons who experienced an unforeseen emergency demand on their pantry because of the arrival on Sunday of unexpected visitors. The accused led evidence to this effect. However, the Court rejected this argument on the ground that the accused was not under any necessity to make the sale, nor could the sudden demand on the hospitality of the purchaser be deemed to necessitate an act of mercy.

On the other hand, Judge O'Hearn in *Ninos* appeared to have emphasized the "necessity or mercy" of the purchaser in considering the sale of bananas and root beer. Mr. Justice Stuart in *Kent* emphasized the necessity interests of the consumer in distinguishing between the sale of apples and candy, and the operation of an eating house on Sunday. Also, the majority in *Cummings* suggested that the "necessity" referred to in the statute for the sale of gasoline was the necessity of the purchaser and not that of the seller.

The business of coin-operated laundries has provided another interesting type of test for the scope of the general words "work of necessity or mercy". In *Regina v. Coin Launder-All Limited*,⁸⁸ a 1960 case in an Alberta District Court, Buchanan, C.J.D.C., approved of the broad interpretation given to section 11 in *Cummings* and *Pacific Inland Express*, and then proceeded to outline how automation by 1960 had produced the modern washing machine and drier which, in great abundance in multiple-dwelling buildings, had the effect of drastically reducing the hours of many people formerly spent in the old-fashioned hand method of washing clothes. Thus, its use on the Sabbath freed the user for more congenial and appropriate Sabbath activities. These facts he contrasted with the situation in 1906 when the *Lord's Day Act* was first passed. He also pointed out that no employees were stationed on the premises in question, and the only possibility of a person being involved was in the event of mechanical failure when a mechanic might be called in. He noted that Parliament, by including clause (r) in section 11 ("the delivery of milk for domestic use, and the work of domestic servants and watchmen") thereby classified the work of domestic servants as "work of necessity". Therefore, by a normal application of that exception to the year 1960, he held that the furnishing of coin-operated washing machines and driers on Sunday should likewise be deemed a work of necessity.

⁸⁷ 1859, C.S.U.C., c. 104.

⁸⁸ (1960), 31 W.W.R. 262 (Alta. D.C.).

Another coin-operated laundry situation reached the Supreme Court of Canada the following year in *Gordon v. The Queen*,⁸⁹ referred to in the previous section. However, the question as to whether the accused was carrying on a work of necessity or mercy within the meaning of section 11 was not raised at trial or in the appeal to the Ontario Court of Appeal, and in the absence of any evidence as to what was being washed or dried in the machines, the Supreme Court of Canada could not consider the point. The Court stated (Locke, Martland, Judson and Ritchie, JJ.) that if it was intended by the accused to contend that the operation fell within the exception of section 11, the onus was on him to prove it. However, the accused had called no evidence and there was none in the case for the prosecution upon which such a finding could conceivably have been made. The Court refused to consider the decision in *Coin Launder-All* since in the absence of any evidence on the point it was unnecessary.

The 1947 Ontario case of *Rex v. Icelandia*,⁹⁰ referred to earlier in this chapter, provides an interesting contrast with some of the broad interpretations given to section 11 in many of the transportation cases and in the *Coin Launder-All* case. There, Mr. Justice Gale was required to decide whether the operation of a skating rink on Sundays for hockey practices by member teams of a junior league at the hourly rental rate of \$15.00 constituted a "work of necessity" within section 11. His Lordship noted:

I admit that such operation would be highly convenient, desirable and beneficial to those who would be entitled to participate, but it could not fairly be said to be so indispensable or imperative as to come within the scope of the exception, particularly as the section itself suggests that in defining the expression "work of necessity or mercy" the ordinary meaning of these words is to be applied. After all, the use of the ice surface for skating or hockey practices is but recreation, and no matter what final advantages, both moral and physical, will flow from that activity, the exempting section of the Act would be improperly distended if stretched to include recreational programmes of that nature. There is no "compelling", "imperative", or "pressing" need (the usual definition of "necessity" found in recognized dictionaries) about hockey practices which may truly be said to be contemplated by the statute before it ceases to be effective. If the Sunday practices were discontinued, neither life nor property nor health would be imperilled in any tangible way. . . .

... [I]t is impossible to believe that the Act is meant to exempt activities which may be described merely as recreational, beneficial, desirable or convenient. On the contrary, I am satisfied that in view of the Act work may be performed only where some real impairment to life or property is likely to accrue if that work is prevented. . . .

⁸⁹ 1961 S.C.R. 592.

⁹⁰ 1947 O.R. 761.

Changing times do bring about fresh concepts, but it is not the prerogative of the Court to recognize and then apply new values and desires to the extent that the effect of a statute is destroyed. A clear line must be drawn between the process of interpretation by the Court and the Court legislating.⁹¹

There are very few reported cases in which the Courts have been required to determine whether various industrial processes and construction could be exempted from the *Lord's Day Act* as works of necessity or mercy. However, five cases, four of which arose in Quebec, give some indication as to the judicial approach generally followed. In *Lake St. John Pulp and Paper Co. v. Otis*,⁹² the Quebec Court of King's Bench in 1942 refused to convict the owner of a pulp and paper mill where the evidence showed that the nature of continuous operations involving Sunday consisted of repairs to the mill, keeping up fires and the manufacture of sufficient pulp to enable the mill to commence manufacturing paper on Monday. In addition, it was held that the manufacture of pulp in such cases fell within section 11(d) where evidence showed that the stoppage of the mill might create serious injury to the corporation and to the community. The same Court several years earlier in *R. v. News Pulp and Paper*⁹³ had held that the operation of a lumber mill to prevent clogging in the mechanical equipment was not prohibited, also based on section 11(d). In a Quebec Magistrate's Court, it was held in *Rex v. Porter and Sons Ltd.*⁹⁴ that work on the construction or repair of wharves could be allowed on Sunday as a "work of necessity" when there was a menace of ice coming down the river in an early winter with danger of flood in the spring following. A Quebec Court of Sessions of the Peace (Roy, J. Sess.) held in *Rex v. Standard Lime Company*⁹⁵ that a factory engaged in the production of lime which was a necessary chemical for the manufacture of war products in other factories was "a work of necessity". Finally, in *Re Maple Leaf Condensed Milk Co.*,⁹⁶ Mr. Justice Middleton held that the taking by a condensed milk company of milk from farmers on Sunday, the farmers not being able to keep the milk over Sunday and deliver it on Monday in a condition suitable for manufacture, was a "work of necessity" within section 11(m).

In summary, while there would appear to be a general tendency for the Courts to give the expression "work of necessity or mercy" a broad interpretation so as to reflect modern conditions, there has been no consistency among the Courts of different provinces on such matters as the sale of gasoline, truck transport, and the sale of various grocery and other consumable items. Also, there have been conflicting judicial opinions as to whether section 11 refers to the "necessity or mercy" of the person doing the act or another person receiving the benefit of it. In *Wells and Bortnick*, the former was held to be the proper interpretation, while in *Ninos, Kent and Cummings* the latter

⁹¹ *Ibid.*, at pp. 771-773.

⁹² (1942), 79 C.C.C. 398 (Que. K.B.).

⁹³ (1917), 28 C.C.C. 77 (Que. K.B.).

⁹⁴ (1937), 68 C.C.C. 163.

⁹⁵ (1942), 77 C.C.C. 376.

⁹⁶ (1921), 49 O.L.R. 6.

interpretation prevailed. Certainly many of the twenty-four examples of works of necessity or mercy in section 11 would indicate that the expression is open to either interpretation, or even both in combination. For example, section 11(b) ("work for the relief of sickness and suffering, including the sale of drugs . . .") is clearly concerned with the necessity or mercy of another person receiving the benefit of such work or sale. However, section 11(m) ("the caring for milk, cheese and live animals . . .") probably is concerned with the commercial necessity of the person doing the caring.

The Supreme Court of Canada has not given a definitive interpretation to the expression "work of necessity or mercy", and until that happens, the Courts in each province can be expected to approach this matter on a case by case basis, following earlier interpretations by the higher Courts in that same province, but not necessarily following decisions on the same matter by Courts in other provinces.

E. THE VALIDITY OF SUNDAY CONTRACTS

The illegality of contracts made on Sunday is founded on statute. At common law, Sunday contracts are valid.⁹⁷ In Canada, only where a contract is made as part of conduct prohibited by the *Lord's Day Act* or provincial Sunday observance legislation will the Courts refuse to enforce it.

The law in this area is essentially an application of the principles relating to the enforceability of illegal contracts. The general rule is that a contract made in violation of a statute is *ex turpi causa oritur non actio* (i.e., neither party can claim any right or remedy under it). In practice, the rule is limited in that it does not constitute a cause of action but is merely a defence. The policy behind the rule has been described by Lord Justice Lindley as follows:

No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.⁹⁸

The limited application of this rule in respect to contracts made on Sundays can best be illustrated by reference to the leading English case of *Drury v. Defontaine*.⁹⁹ There, the plaintiff had left his horse to be sold by one Hull, who kept a commission stable for the sale of horses by auction. The defendant came to Hull's stable and it was agreed that he could take the horse and show it to another party but if he did not return it by 2 o'clock it would be considered sold. When the defendant brought the animal back after the appointed hour, Hull refused to take it. The plaintiff sued for the price of the horse and the

⁹⁷*Drury v. Defontaine* (1808), 1 Taunt. 131; *Swann v. Broome* (1764), 3 Burr. 1595; *Rex v. Waldon* (1914), 6 W.W.R. 850 (B.C.C.A.); *Cudney v. Givens* (1890), 20 O.R. 500.

⁹⁸*Scott v. Brown, Doering, McNab & Co.*, 1892 2 Q.B. 724, at p. 728.

⁹⁹(1808), 1 Taunt. 131.

defendant pleaded that the contract was illegal under the *Sunday Observance Act* of 1677, having been made on Sunday. Lord Mansfield pointed out that Sunday contracts did not appear to be void at common law unless covered by statute. His Lordship referred to the wording of the Act "that no person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's Day". He then went on to say that:

to bring this case within the Act, we must pronounce that either Drury or Hull worked within their ordinary calling on Sunday. But the sale of horses by private contract was not Drury's ordinary calling, nor was it Hull's. His calling was that of horse auctioneer, and he was not within his ordinary calling of selling this horse by private contract; and therefore . . . the sale must be held good . . .

The defendant might have avoided the contract had Drury or his agent Hull been doing work of their ordinary calling and thus violating the Act. However, the defendant would have been estopped from pleading the illegality if he himself was doing work of his "ordinary calling" in violation of the Act. Indeed, in the other leading English case on this subject, *Bloxsome v. Williams*,¹⁰⁰ Mr. Justice Bayley expressly refused to allow the defendant to escape from an oral Sunday contract for the sale of a horse, because unknown to the plaintiff purchaser, he was a horse-dealer exercising his ordinary calling and could not set up his own breach of the law in defence. However, had the plaintiff known of this breach of the law, or himself been in breach of the law by doing work in his ordinary calling, then the contract might have been set aside.¹⁰¹

Most of the cases in Canada on the validity of Sunday contracts have turned on the issue of whether they were made in violation of section 4 of the federal *Lord's Day Act*. It is necessary, therefore, to consider carefully the express words of this provision:

It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business or labour.

At the outset, the two "exception" phrases give rise to the validity of certain contracts which would otherwise be invalid because they are made in violation of one or more of the prohibitions. The phrase "except as provided herein" refers chiefly to works of necessity or mercy which are exempted from the prohibitions by virtue of section 11. Thus any contract involving a transaction coming within section 11 would be valid if made on Sunday, or if

¹⁰⁰ (1824), 3 B. & C. 232.

¹⁰¹ See *Fennell v. Ridler* (1826), 5. B. & C. 406.

it contained a provision calling for continued contractual relations on Sunday.¹⁰²

The phrase "except as provided . . . in any provincial Act or law now or hereafter in force" would likewise result in the upholding of a Sunday contract made as part of an activity which is expressly permitted by a provincial Act or law, such as those permitted by *The Lord's Day (Ontario) Act*. Thus, a Sunday contract arising out of the sale of a ticket to a spectator entitling him to witness a professional sporting event in an Ontario municipality which has enacted the necessary enabling bylaw under *The Lord's Day (Ontario) Act* could not be avoided on any ground related to the prohibitions in section 4.

The reported cases in Canada in which the Courts have had to consider the validity of contracts involving activities prohibited by section 4 provide interesting contrasts in judicial attempts to apply principles of equity or to pinpoint the exact day when a contract is consummated. For example, in the recent case of *Perry v. Anderson*¹⁰³ in British Columbia, a prospective purchaser of real estate had given the vendor's agent an offer to purchase on Saturday, and the offer was accepted by the vendor on Sunday although the document was predated to the Saturday. The vendor later changed his mind, but the prospective purchaser sued for specific performance. Mr. Justice Macdonald dismissed the action, holding the agreement void by virtue of the illegality under section 4. While it was argued that the vendor should not be permitted to set up his own illegal act as a defence, the prospective purchaser here knew one or two days after the acceptance that the offer was accepted on Sunday, so the Court refused to find that the vendor was estopped under the circumstances and dismissed the action.

A similar case arose in Manitoba in *Ciz v. Hauka*¹⁰⁴ in which the Court upheld a claim for the return of a deposit for the purchase of a farm lot where the agreement of purchase and sale had been entered into on a Sunday. In declaring the agreement void, the Court did not find it necessary to determine whether the vendor or the purchaser were carrying on business of their "ordinary calling", it being sufficient under section 4 that it was "not lawful . . . on the Lord's Day . . . to sell or offer for sale or purchase . . . any real estate . . ."

These two cases might be contrasted with *Olliviere v. Durand*¹⁰⁵ which was an action for the balance of the purchase price of a hay baler for which the contract of sale had been made on a

¹⁰²See *Memramcook Transport Ltd. v. Irving Oil Company* (1959), 25 D.L.R. (2d) 120 in which the New Brunswick Court of Appeal sustained the validity of a lease which called for the sale of gasoline and automobile accessories on Sunday, on the ground that this activity involved work of necessity or mercy under section 11, specifically subsection (g): "the conveying of travellers and work incidental thereto".

¹⁰³(1970), 12 D.L.R. (3d) 414 (B.C.).

¹⁰⁴(1953), 108 C.C.C. 349 (Man. Q.B.).

¹⁰⁵(1953), 9. W.W.R. (n.s.) 53 (Man. C.A.).

Sunday. The Manitoba Court of Appeal unanimously agreed that the contract should be enforced notwithstanding that the contract was made on a Sunday, because of events subsequent to the Sunday. The machine was delivered on a weekday and there also had been subsequent part payment and a promise to pay the balance. Apparently, the negotiations on the Sunday were indefinite and it was some days subsequent to the initial arrangement when all matters were completed on the deal. In the Ontario case of *Angevaere v. McKay*,¹⁰⁶ a contract for the sale and purchase of a motor car was executed on a Sunday but dated two days later and a conditional sale contract was entered into on the next weekday. Judge Kennedy held that the contract was void on the basis of section 4 of the federal *Lord's Day Act*. He reasoned that while the conditional sale agreement was made on a weekday subsequent to the initial Sunday in question, such conditional sale contract was merely a document setting out in greater detail the contract that was actually made the previous Sunday, and was related only to financing the sale, not the sale itself.

The Saskatchewan Court of Appeal in *Superior Motors Limited v. Cade*¹⁰⁷ refused to enforce a contract for the sale of a motor car where such contract had been made on Sunday. In *Farrell v. Sawitski*,¹⁰⁸ Judge Doak in a Saskatchewan District Court refused to enforce a building contract entered into on a Sunday, even though section 4 of the federal Act had not been pleaded.

Even a contract of employment entered into on a Sunday is in jeopardy of being declared invalid on the basis of section 4. In the British Columbia case of *Lister v. Burns and Co.*,¹⁰⁹ a contract of hiring as a farm manager made on a Sunday was declared illegal, particularly in the light of the fact that the hiring contract contained an arrangement which would give the prospective farm manager a salary plus 10% of the profits in exchange for which he would give the owner his herd of pure bred Jersey cows. Even though the employment contract was tied to a sale on the Sunday, Judge Swanson specifically rejected an argument based on the early English case of *The King v. Whitnash*,¹¹⁰ to the effect that a hiring contract was not within the manager's "ordinary calling". The ground for rejection was the more all-embracing wording of section 4 as compared with the English *Sunday Observance Act* of 1677 which was at issue in the *Whitnash* case. Because section 4 contained the words "in connection with such calling", and the English statute did not, Judge Swanson refused to follow *Whitnash* and held that the contract of hiring was within the section 4 prohibition.

In *Norman Gershevich Realty Sales Co. v. Greenberg*,¹¹¹ it was held by a Quebec Superior Court that a real estate agent was not entitled to collect his commission in respect of a contract for the sale of land

¹⁰⁶(1960), 25 D.L.R. (2d) 521 (Ont. C.C.).

¹⁰⁷[1930] 3 D.L.R. 1003.

¹⁰⁸[1929] 4 D.L.R. 289.

¹⁰⁹[1931] 3 D.L.R. 105 (B.C.C.C.).

¹¹⁰(1827), 7 B. & C. 596.

¹¹¹[1957] R.L. 314 (Que. S.C.).

which he had arranged where the commission agreement had been made and signed on a Sunday.

In the Saskatchewan case of *Sumner v. Steeves*,¹¹² the commission agreement had been entered into on a weekday, but the prospective purchaser eventually found by the real estate agent entered into an agreement for purchase and sale executed on a Sunday. Notwithstanding the illegality of the agreement of purchase and sale by virtue of section 4, three out of four members of the Court of Appeal sitting held that the agent was still entitled to his commission since he had performed his contract when he found the person who subsequently became purchaser. The Court noted that it was improper to confuse the illegality of the contract of sale made on Sunday with the contract for commission, and that anything the agent did on Sunday in assisting the completion of the illegal agreement of purchase and sale had no bearing on the validity of his own contract for commission from the vendor of the land. McNiven, J. A., in dissent, noted that the agent's right to commission depended on his finding a purchaser, and that he had done this by carrying on his business on Sunday in violation of section 4. He suggested that the terms of the agent's employment contemplated or connoted a lawful transaction, and that if, for example, an agent obtained a purchaser for property to be used as a brothel to the agent's knowledge, he could not recover his commission in that case. The agent's claim for commission was dependent on a contract of sale having been completed, and since this contract was illegally made on Sunday (the agent being party to its completion), his claim for commission must fail also.¹¹³ There was, in his Lordship's opinion, no basis for a claim for services rendered prior to the Sunday.

Another real estate commission case arose in the British Columbia case of *Gibbons v. Koepke*.¹¹⁴ The plaintiff real estate agent's salesman showed a listed property to a prospect on Sunday and took from him a deposit of \$500 on terms slightly different from the original listing. On Monday the salesman showed the offer to the owner who refused to accept it and it was only after the plaintiff himself intervened and used his persuasive powers that the owner accepted the offer some days later. While the offer was actually signed on the Sunday, it was dated the day before. Mr. Justice Wood held that the case was governed by section 4 of the federal *Lord's Day Act* in the absence of any law of British Columbia authorizing the sale of land or the carrying on of one's ordinary calling on Sunday, but that the defendant in this case did not accept the purchaser's offer until sometime after the Sunday. He construed the purchaser's offer as a continuing offer communicated to the vendor on Monday. Therefore he found that the agent was not disentitled to his commission since there was not an agreement until some time following the Sunday. He noted however that the plaintiff and also the purchaser might have been successfully prosecuted for offering to sell and offering to purchase real estate on

¹¹²(1957), 6 D.L.R. (2d) 619 (Sask. C.A.).

¹¹³See *Allistone & Cunningham Limited v. Wallace* (1949), 2 W.W.R. (n.s.) 690 (B.C.C.C.) in which a claim for real estate commission arising out of a sale completed on a Sunday was dismissed on the basis of section 4 of the federal *Lord's Day Act*.

¹¹⁴1951 4 W.W.R. (n.s.) 560 (B.C.).

Sunday, but that there was no authority to show that under the circumstances the sale was not valid or that the agent was not entitled to his commission.

*Bailey v. Rawson*¹¹⁵ was an Ontario case involving the actions of a real estate agent who negotiated the sale of some property of his client on a Sunday and gave the proposed purchaser a signed receipt for \$5 paid for an "option" on that day. The agent told his client about this next day, and the client said he would let the sale go through. Subsequently, further monies changed hands to apply on the purchase and there were letters between the purchaser's solicitors and the vendor. Chief Justice Meredith held that the contract was not void under the federal *Lord's Day Act* because, although the agent's receipt was signed on a Sunday, there was no completed contract until the following day.

Collateral events prior to a Sunday contract will often save it from invalidity. This was clearly brought out in the Manitoba case of *Aconley v. Willart Holdings Ltd.*¹¹⁶ Although the purchaser of the land had signed the agreement for sale on a Sunday, the vendor had left the documents with his solicitor on the previous Friday having signed them and with the full expectation that they would be executed by the purchaser that afternoon. The Court based its decision on the ground that section 4 of the federal Act was inapplicable since there had been a part performance prior to the Sunday and since there had been a complete meeting of minds between the parties and an agreement on all terms of the contract before the Sunday.

It would seem also that a Sunday contract is more likely to be saved from invalidity when it is not wholly made, or at all events completed on Sunday, but includes provisions agreed to subsequently. *Olliviere v. Durand* is certainly authority to this effect, as are the real estate cases of *Gibbons v. Koepke* and *Bailey v. Rawson*. The Ontario case of *Gamble v. Wright*¹¹⁷ upheld a contract for the sale of shares where the terms of the agreement had been stated orally on Sunday but on a day subsequent to Sunday payments had been made and accepted. Mr. Justice Kelly held that since there was nothing in writing on the Sunday, there was no completed contract on that day and that matters were not completed until payments were actually made under specific oral terms agreed to at the time of the exchange of money.

Alberta is the only Canadian province with provincial legislation dealing expressly with Sunday contracts. Section 67 of *The Land Titles Act*¹¹⁸ of the province provides:

All sales and purchases and all contracts and agreements for sale or purchase of any property made by any person or persons on the Lord's Day are utterly null and void.

A similar provision relating to the sale and purchase of personal property appears in section 5 of the *Alberta Sale of Goods Act*.¹¹⁹

¹¹⁵(1912), 25 O.L.R. 387.

¹¹⁶(1964), 47 D.L.R. (2d) 146 (Man. Q.B.).

¹¹⁷(1927), 31 O.W.N. 482; affirmed 32 O.W.N. 193 (C.A.).

¹¹⁸R.S.A. 1955, c. 170, s. 67.

¹¹⁹R.S.A. 1955, c. 295, s. 5.

Section 67 of *The Land Titles Act* was applied recently by Mr. Justice O'Byrne in the Supreme Court of Alberta in the case of *Neider v. Carda of Peace River District Limited*.¹²⁰ The plaintiff owned certain farm land, some farm machinery and two lots in the village of Jean Cote, all of which were mortgaged to the defendant, a lending institution. When the plaintiff ran into financial difficulties, a settlement was arranged whereby the plaintiff would sell to the defendant farm lands, and the defendant would discharge its mortgage on the village lots and on the machinery. The transfers of land were executed on the Sunday although the defendant by its officers inserted dates other than a Sunday on the actual transfers. The discharge of mortgage was signed later, and all documents were subsequently registered in the appropriate government offices. The plaintiff later sought to set the transaction aside, and pleaded both section 4 of the federal *Lord's Day Act* and section 67 of *The Land Titles Act*. Mr. Justice O'Byrne held that section 67 of *The Land Titles Act* was clear, and that the purchase and sale of land was utterly null and void. He also held that the registration of the transfers did not have the effect of perfecting the transaction and he went on to hold that even though the chattel mortgage discharge was not completed on the Sunday, it was collateral to the agreement covering the sale and purchase of the land and therefore it too was a nullity. His Lordship specifically stated that it was unnecessary to deal with the federal *Lord's Day Act* and the illegality of the contract and the doctrines which usually apply in such circumstances since his judgment turned purely on *The Land Titles Act*.

The Saskatchewan case of *Schuman v. Drab*¹²¹ in 1919 turned on the application of the following provision in the since-repealed *Act to Prevent the Profanation of the Lord's Day* in that province:

All sales and purchases and all contracts and agreements for sale or purchase of any real or personal property whatsoever made by any person or persons on the Lord's day shall be utterly null and void.¹²²

The contract in question involved the purchase of 68 tons of hay. The written contract was entered into on a Sunday but the hay was not delivered until a weekday following, and the purchaser accepted such delivery. The Saskatchewan Court of Appeal held that the contract was void and that the subsequent delivery did not cure the illegality. No reference was made in the judgment to section 4 of the federal *Lord's Day Act*.

In Ontario, *An Act to Prevent the Profanation of the Lord's Day* included this section:

All sales and purchases, and all contracts, agreements for sale or purchase of any real or personal property whatsoever, made by any person or persons on the Lord's Day, shall be utterly null and void.¹²³

¹²⁰ Unreported; written judgment delivered on January 23, 1970 in the Supreme Court of Alberta, Trial Division, Judicial District of Peace River.

¹²¹ (1919), 49 D.L.R. 57 (Sask. C.A.).

¹²² R.S.S. 1909, c. 69, s. 3.

¹²³ R.S.O. 1897, c. 246, s. 9.

However, the Judicial Committee of the Privy Council in 1903 in *Hamilton Street Railway*¹²⁴ declared the entire Act "treated as a whole" to be *ultra vires* the provincial Legislature. Therefore, this section, together with all the cases in which it had been applied to Sunday contracts in Ontario,¹²⁵ was no longer of any consequence.

A final matter relating to Sunday contracts concerns the question of damages. In *Union Gas Co. of Canada Ltd. v. Brown*,¹²⁶ the gas company brought an action for damages for trespass to its pipeline easement which was under construction and with which the defendant had interfered. In attempting to prove the extent of its damages, the gas company claimed an extra increment for lost wages and overhead in respect of premium Sunday work which would have been performed but for the delay occasioned by the obstruction of the defendant. The gas company submitted that the contractor doing the work for it had an overtime work permit issued under the regulations of *The Hours of Work and Vacation with Pay Act*¹²⁷ in Ontario. Mr. Justice Moorhouse held that the permit merely authorized work in excess of 48 hours per week, and not necessarily work on a Sunday. He concluded that sections 4 and 11 of the federal *Lord's Day Act* were applicable, and that any operations of the gas company's contractor on Sunday would have been illegal since there was no evidence that the work was one of necessity. Therefore the gas company could not claim special damages for what would have been tantamount to breach of the federal Act. Accordingly, his Lordship did not allow the amount claimed as an increment for premium Sunday work.

In summary, the Courts in Canada would still appear to be willing to apply the general principles relating to illegal contracts to contracts made on Sunday. If a contract is made on Sunday in violation of a Sunday observance statute, the Courts will generally refuse to enforce it unless the person attempting to extricate himself from the bargain is relying on his own illegal conduct or was fully aware of the illegal conduct of the other party. This rule applies to most types of contracts, including contracts for sale of real or personal property, real estate commission agreements and contracts of employment.

However, the incidence of collateral events either prior or subsequent to Sunday will be carefully examined to determine whether or not the contract is substantially made on that day. Collateral events which might save an alleged Sunday contract from invalidity include part payment, delivery, the working out of further details, or the advance delivery of completed documents. But the mere insertion of dates other than Sunday on a written contract that is otherwise made on Sunday will not by itself save the contract from invalidity if it violates a Sunday observance statute.

¹²⁴[1903] A.C. 524.

¹²⁵See *Cudney v. Gives* (1890), 20 O.R. 500; *Lai v. Stall* (1850), 6 U.C.Q.B. 506; *Bethune v. Hamilton* (1841), 6 O.S. 105; *Wilt v. Lai* (1850), 7 U.C.Q.B. 535; *Houliston v. Parsons* (1852), 9 U.C.Q.B. 681; *Crombie v. Overholtzer* (1853), 11 U.C.Q.B. 55; *Crosson v. Bigley* (1885), 12 O.A.R. 94; *Consumer's Cordage Co. v. Connolly* (1901), 31 S.C.R. 244; and *Vail v. Duggan* (1850), 7 U.C.Q.B. 568.

¹²⁶(1968), 67 D.L.R. (2d) 44.

¹²⁷R.S.O. 1960, c. 181; now part of *The Employment Standards Act*, S.O. 1968, c. 35.

A recent case in England, *Rollswin Investments Ltd. v. Chromolit Portugal Cutelarias E Produtos Metalicos, S.A.R.L.*,¹²⁸ might well herald the cutting back of Sunday observance statutes insofar as they affect the Sunday contracts of corporations. There, Mr. Justice Mocatta in the Queen's Bench Division refused to allow the corporate defendant to extricate itself from a Sunday contract on the basis of the English *Sunday Observance Act* of 1677, on the grounds that the Act was not intended to extend to acts of limited companies since such entities were incapable of "public worship" or "repairing to the church" or "exercising [themselves] in the duties of piety and true religion". In Canada, the federal *Lord's Day Act* does not contain the same degree of compulsory religious observance as the 1677 English Act, but there is no doubt that its primary purpose was religious and that the name of the statute and the provisions which prohibit various recreational and avocational activities are designed to promote church attendance and religious conformity of which a Court might deem a corporate entity to be incapable.

In Chapter 19, we will discuss whether or not legislative changes in the present law of Sunday contracts are necessary or desirable.

F. LEGAL AND ADMINISTRATIVE PROCEEDINGS ON SUNDAY

From very early times, Sunday has been regarded as a *dies non juridicus* (i.e., a day on which no judicial act ought to be done). This is to be contrasted with the common law position respecting Sunday contracts which, in the absence of any statutory provision, have been considered valid.

Whether Sunday as a *dies non juridicus* had its early origin in a statute or in the early unwritten law of England is a question still open to historical debate. For example, George S. Holmested in his book on Sunday laws¹²⁹ refers to the judgment of Lord Mansfield in *Swann v. Broome*¹³⁰ and states:

It appears that even Sunday was not a *dies non* at Common law, for he [Lord Mansfield] says 'writs were formed in those times when the Courts of Justice might sit on Sundays.' He came, in that case, to the conclusion, however, that Sunday was a *dies non juridicus*, but strange to say he . . . omits to refer to [any statute] . . .¹³¹

However, if early statutes existed respecting Sunday as a *dies non juridicus*, they have now become so accepted as part of our common law that it would be difficult to assert a contrary position. This point was noted by Mr. Justice Schroeder in *Attorney-General for Canada v. Hirsch* in the Ontario Court of Appeal:

¹²⁸The Times, February 11, 1970 (Queen's Bench Division, written judgment delivered February 9, 1970).

¹²⁹Holmested, *Sunday Laws in Canada* (1912).

¹³⁰(1764), 3 Burr. 1595.

¹³¹Holmested, *op. cit.*, p. 41.

Sunday, as *dies non juridicus*, may have had its origin in a statute and may not, with strict accuracy, be described as *lex non scripta*, but the statute is nevertheless so ancient that "the memory of man runneth not to the contrary" and hence the prohibition against the sittings of the Courts on Sunday and their performance of judicial acts on that day may not be denominated a part of the common law.¹³²

The purposes which Mr. Holmsted attributes to Sunday being a *dies non juridicus* were to free all persons connected with the courts for religious observance and to permit them to abstain from bodily labour. Mr. Justice Laidlaw, in his dissenting judgment in the *Hirsch* case, reviewed the ancient authorities and determined that the reason and purpose of the prohibition against the doing of any judicial act on Sunday was to keep that day holy and to maintain the sacred character of that Christian institution "for the better worship and service of God in spirit and truth",¹³³ and to keep it "from being profaned by the tumult of forensic litigations".¹³⁴

The major English statute declaring that Sunday was *dies non juridicus* was (1552), 5-6 Edw. 6, c. 3. This statute became part of the law of Upper Canada by the *Constitutional Act* of 1792, and later, part of the law of the province of Ontario by virtue of section 129 of the *British North America Act*. It is significant to note that section 6 of (1552), 5-6 Edw. 6, c. 3 provided that works of necessity were permitted on holy days. Mr. Holmsted lists some judicial acts that historically have been regarded as coming within the exception: proceedings against criminals; acknowledgements of fines and recognizances in cases of emergency; the bringing of appeals when the right would otherwise be lost; and the taking of testimony of a witness whose evidence might otherwise be lost.¹³⁵ He also mentions the obtaining of an interim injunction in emergency circumstances, but states that he was unable to find any case in which the validity of an interim injunction granted on the Lord's day was in question. However, he does point out a U.S. case where the validity of such an injunction was upheld.¹³⁶

In Ontario, a coroner's inquest and inquisition on a Sunday were held in 1870 to be void by Mr. Justice Galt in *Re Cooper*.¹³⁷ In *R. v. Murray*¹³⁸ in 1897, a preliminary inquiry was likewise held to be a nullity. However, neither of these cases attempted to define the extent of the term "work of necessity" in the judicial context, except to say that it did not include the type of proceeding in issue in that case.

¹³²(1960), 24 D.L.R. (2d) 93, at p. 111.

¹³³*Mackalley's Case* (1611), 77 E.R. 824.

¹³⁴Blackstone, *Commentaries on the Laws of England* III, p. 276 (referring to a Canon of the Church, A.D. 517 which was received and adopted by the Saxon kings, embodied in the Constitution of Edward the Confessor, confirmed by William the Conqueror and Henry II, and thus part of the common law of England).

¹³⁵Holmsted, *op. cit.*, p. 64 (relying on the early writings of Spelman, in *Orig. of Terms*, c. 3).

¹³⁶*Ibid.* The U.S. case upholding the validity of an interim injunction granted on Sunday was *Langabier v. Fairbury. P. & N. Ry. Co.*, 64 Ill, 243.

¹³⁷(1870), 5 P.R. 256.

¹³⁸(1897), 28 O.R. 549 (C.A.); see also *R. v. Cavelier* (1896), 1 C.C.C. 134 (Man.).

The only Ontario case in which the *dies non juridicus* rule has been referred to generally is *Foster v. Toronto Railway Company*¹³⁹ in 1889. There, Chancellor Bond in the Divisional Court held that the only day on which no judicial act could be done was Sunday, and that other statutory holidays (in the case at bar, Good Friday) were not *dies non juridici* in this sense.

This common law prohibition of Sunday court proceedings (except in the case of "works of necessity") is in direct contrast to proceedings of administrative tribunals exercising judicial functions on Sunday. In *Attorney-General for Canada v. Hirsch*,¹⁴⁰ the Ontario Court of Appeal by a two to one decision held that the *dies non juridicus* rule applies only to judicial acts by a judge or judicial officer in the performance of his duties in the ordinary course of the administration of justice, and not to administrative tribunals even when they are required to act judicially. In this case, Mr. Justice Schroeder (with whom McGillivray, J. A. concurred) refused to declare invalid the hearing and deportation order of a special inquiry officer under the *Immigration Act*¹⁴¹ because they were held and made on Sunday. It was implied that the Court would have reached the same result had the administrative tribunal been constituted by provincial statute or municipal bylaw as well, i.e., the Sunday proceedings of such proceedings would be valid in the absence of statutory provisions to the contrary. However, it was a particularly relevant finding of the majority judgment that the duties of the special inquiry officer could be regarded as acts of necessity and thus exempted from the common law rule or the prohibition in (1552), 5-6 Edw. 6, c. 3. Also, it was held that section 11(k) of the federal *Lord's Day Act* recognized the special importance and necessity of certain work being performed on Sunday by persons engaged in the public service, and this applied to a special inquiry officer who was required by statute to hold an "immediate inquiry".

Mr. Justice Laidlaw, in dissent, would have applied the *dies non juridicus* rule to *all* judicial acts done on a Sunday, whether by a Court, a statutory tribunal, an agency or a person. However, Mr. Justice Schroeder preferred to limit the rule for reasons of practicality:

If a Special Inquiry Officer were to be prohibited from exercising his powers under Part III of the *Immigration Act* on a Sunday, the most awkward and vexatious consequences would ensue. Persons who might be fully privileged under the Act and Regulations to enter this country would have to be detained in custody until the following day, if they should be so unfortunate as to arrive at a port of entry on Sunday. One can readily envisage how disagreeable and exasperating it would be if an aeroplane or a steamship on which such persons had been passengers and which had made a convenient stop at a port of entry, were to proceed on its course without its *quondam* passengers. One can conceive of many more unpleasant results which would follow in the wake of a rigid adherence to the archaic rule applied by the learned Judge of first

¹³⁹ (1889), 31 O.R. 1.

¹⁴⁰ (1960), 24 D.L.R. (2d) 93.

¹⁴¹ R.S.C. 1952, c. 325.

instance, a rule which, in my view, was never intended to apply to administrative tribunals even in circumstances in which they were required to discharge their functions in a judicial manner.¹⁴²

With respect to the service or execution on Sundays of Court documents in proceedings in Ontario, this is covered by section 126 of *The Judicature Act*:

No person upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order of judgment, except in cases of treason, felony, or breach of the peace, and the service of every such writ, process, warrant, order or judgment on the Lord's Day is void, and the person so serving or executing it is as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without any writ, process, warrant, order or judgment.¹⁴³

However, this section is subject to the overriding exceptions for warrants, summons' and bail orders in criminal cases, as provided in section 20 of the *Criminal Code*:

20.—(1) A warrant or summons that is authorized by this Act may be issued or executed on a Sunday or statutory holiday.

(2) Where an order may be made under this Act admitting an accused to bail, the order may be made and the recognizance entered into on a Sunday or statutory holiday.¹⁴⁴

In cases where a warrant, summons or bail order made on Sunday cannot come within the terms of section 20, such as those made under the *Canada Temperance Act*¹⁴⁵ or under a provincial statute which does not incorporate section 20 into its prosecutory procedure,¹⁴⁶ these judicial acts are deemed to be invalid at common law.¹⁴⁷ The effect of section 20, then, is to validate the issuance or execution of a warrant or other process that would otherwise be prohibited.¹⁴⁸

In Ontario, section 113 of *The Liquor Control Act* does not incorporate section 20 but enacts its own provision in respect of search warrants:

¹⁴² (1960), 24 D.L.R. (2d) 93, at p. 114.

¹⁴³ R.S.O. 1960, c. 197, s. 126.

¹⁴⁴ S.C. 1953-54, c. 51, s. 20; amended by S.C. 1959, c. 41, s. 4.

¹⁴⁵ *Ex parte Frecker* (1897), 33 C.L.J. 248 (N.B.); *R. v. Lawlor*; *Ex parte Willis* (1916), 48 N.B.R. 340 (N.B.).

¹⁴⁶ *R. v. Boughner* (1930), 53 C.C.C. 170 (Ont.); *Ex parte Moore* (1921), 58 D.L.R. 307 (N.B.). In *Rex v. Smith*, [1927] 2 D.L.R. 92 (Man. C.A.), a warrant of arrest issued on Sunday under the *Manitoba Temperance Act* was held to be valid because the Act incorporated by reference certain provisions of the *Criminal Code*, including the predecessor to section 20.

¹⁴⁷ *Hanson v. Shackelton* (1835), 4 Dowl. 48; *Taylor v. Phillips* (1802), 3 East. 155; *R. v. Ettinger* (1899), 3 C.C.C. 387 (N.S.); *McKinnon v. Proud* (1874), 1 P.E.I. 474.

¹⁴⁸ *R. v. Train* (1959), 124 C.C.C. 302 (N.B.C.A.); *R. v. McGillivray* (1907), 13 C.C.C. 113 (N.S.C.A.); *R. v. Leahy*; *Ex parte Garland* (1901), 35 N.B.R. 509 (N.B.C.A.).

Notwithstanding anything in this Act or the regulations, any search warrant or authorization to search issued or authorized under this Act may be executed at any time, including Sunday or other holiday, and by day or night.¹⁴⁹

The validity of receiving an information on Sunday, as contrasted with issuing or executing a warrant or summons, was raised in two recent cases, *R. v. Johnston*¹⁵⁰ in Ontario, and *R. v. Train*¹⁵¹ in New Brunswick. Both cases held that the receiving of an information was a ministerial and not a judicial act, and therefore was valid at common law since it did not come within the *dies non juridicus* rule. The Court in *Johnston* also held that the receiving of an information could be deemed to be a "work of necessity" under the federal *Lord's Day Act*.

There have been no reported cases interpreting the words of section 20(2) of the *Criminal Code* relating to a bail order made on Sunday. Neither have there been any cases in which the conflict between the prohibition in section 126 of *The Judicature Act* and the permission in section 20 of the *Criminal Code* has been raised. But in the case of, say, a criminal warrant under the Code which is executed on Sunday, section 20(1) would prevail and override section 126 of *The Judicature Act* on the basis of the paramountcy doctrine in constitutional law, rendering the warrant valid. This would not neutralize section 126 in respect of the execution of warrants since it would still apply in respect of warrants executed under provincial statutes and render the service of such warrants void (except for specific provisions to the contrary as found in section 113 of *The Liquor Control Act*).

Another provision of some relevance to legal process on Sunday is section 561 of the *Criminal Code*:

The taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday.

It was held in the Manitoba case of *R. v. Cavelier*¹⁵² that this section must be taken as applying only to proceedings before a jury, and that it cannot have the effect of validating the holding of a preliminary inquiry on Sunday which was otherwise void at common law as a judicial act.

Reference should be made to the statutory provisions requiring the various Court offices in Ontario to remain closed on Saturdays and "holidays", which term includes Sunday according to *The Interpretation Act*.¹⁵³ The following Acts relate to the Supreme, County and District,

¹⁴⁹ R.S.O. 1960, c. 217, s. 113.

¹⁵⁰ [1957] O.W.N. 465.

¹⁵¹ (1959), 124 C.C.C. 302 (N.B.C.A.).

¹⁵² (1896), 1 C.C.C. 134 (Man).

¹⁵³ R.S.O. 1960, c. 191, s. 30(10).

and Surrogate Courts respectively: *The Judicature Act*;¹⁵⁴ *The County Courts Act*;¹⁵⁵ and *The Surrogate Courts Act*.¹⁵⁶

*The Division Courts Act*¹⁵⁷ does not mention anything about office hours on Saturday or Sunday being prohibited, but it does provide that if the judge does not open Court on the day appointed for the purpose, the clerk shall adjourn the Court to an hour of the following day, "and so from day to day, adjourning over any Sunday or holiday" until the judge arrives to open Court, etc.

There is no provision in *The Provincial Courts Act*¹⁵⁸ respecting sittings or office hours on Sundays for either the Criminal Division or the Family Division.

Finally, as to the computation of time for any judicial proceeding where the time limited expires on Sunday, section 27(h) and (i) of *The Interpretation Act* would appear to cover the matter:

- (h) where the time limited by an Act for a proceeding or for the doing of anything under its provisions expires or falls upon a holiday, the time so limited extends to and the thing may be done on the day next following that is not a holiday.¹⁵⁹

¹⁵⁴R.S.O. 1960, c. 197, s. 91, repealed and replaced by the following section in Bill 183 of the 3rd Session, 28th Legislature, which received Royal Assent and came into force on November 13, 1970:

91.—(1) In this section, "holiday" means,

- (a) a holiday as defined in *The Interpretation Act*;
- (b) Saturday;
- (c) the day proclaimed as Civic Holiday in the municipality in which the court office is located;
- (d) the 26th day of December in a year in which Christmas Day falls on a day other than Saturday, or the 27th day of December in a year in which Christmas Day falls on a Saturday.

- (2) Except on holidays when they shall be closed, every local registrar's office and the offices of the Supreme Court in Toronto shall be kept open from 9.30 o'clock in the forenoon until 4.30 o'clock in the afternoon.

¹⁵⁵R.S.O. 1960, c. 76, s. 6 (repealed and replaced by the following section in Bill 184 of the 3rd Session, 28th Legislature, which received Royal Assent and came into force on November 13, 1970:

6.—(1) In this section, "holiday" means,

- (a) a holiday as defined in *The Interpretation Act*;
- (b) Saturday;
- (c) the day proclaimed as Civic Holiday in the municipality in which the court office is located;
- (d) the 26th day of December in a year in which Christmas Day falls on a day other than Saturday, or the 27th day of December in a year in which Christmas Day falls on a Saturday;

- (2) Except on holidays when they shall be closed, county court and district court offices shall be kept open from 9.30 o'clock in the forenoon until 4.30 o'clock in the afternoon.

¹⁵⁶R.S.O. 1960, c. 388, s. 16.

¹⁵⁷R.S.O. 1960, c. 110, s. 14. (The title to this Act was repealed and replaced with "The Small Claims Courts Act", by *An Act to Amend the Division Courts Act*, s. 1, Bill 211 of the 3rd Session, 28th Legislature, which received Royal Assent on November 13, 1970, and which came into force on January 1, 1971.)

¹⁵⁸S.O. 1968, c. 103.

¹⁵⁹R.S.O. 1960, c. 191, s. 27(h).

- (i) where the time limited for a proceeding or for the doing of any thing in an office of the Supreme Court, or a county or district court office, or a surrogate court office, or a division court office, or a registry office, or a land titles office, or a sheriff's office expires or falls upon a day that is prescribed as a holiday for such office, the time so limited extends to and the thing may be done on the day next following that is not a holiday.¹⁶⁰

This chapter completes Part II of the Report, covering the history, background and present relevance of Sunday laws in Ontario. We have reviewed the history, religious background, economic background, attitudes and opinions, and behavioural patterns concerning these laws. However, up to this point we have purposely avoided recommending any changes in these laws to permit the reader to review the interdisciplinary background material as a comprehensive and factual base from which proposals and alternatives for change naturally emerge.

Part III consists of our proposals and alternatives, and builds on the broad foundations of Part II.

¹⁶⁰The original clause (i) of section 27 was repealed, and this clause substituted therefor, by Bill 186, 3rd Session, 28th Legislature (received Royal Assent on November 13, 1970).

PART III
PROPOSALS AND ALTERNATIVES FOR ONTARIO

CHAPTER 9

GENERAL PURPOSE AND SCOPE OF SUNDAY LAWS

S U M M A R Y

- A. THE NEED FOR A PAUSE DAY
- B. WHICH DAY?
- C. THE PRIMARY PURPOSE AND EFFECT OF THE LEGISLATION
- D. THE TITLE OF THE LEGISLATION
- E. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. THE NEED FOR A PAUSE DAY

Virtually all people in Ontario want at least one day each week when they are not required to work so that they can engage in leisure pursuits of their own choosing. This is the conclusion we have drawn from the preponderance of evidence placed before us in the briefs and public hearings or obtained independently by our attitudinal, behavioural and economic research personnel. The basis for this almost universal demand for at least one day of non-work would appear to be humanitarian and sociological in nature, relating to both the physiological and psychological well-being of the individual worker in particular, and social interaction among families and friends in general.

This demand is certainly not a phenomenon unique to Ontario. The principle of a weekly rest of at least one day in seven is provided by law in practically every country in the world. The International Labour Organization has established weekly rest conventions for industry¹ and for commerce and offices.² These conventions are, to a large extent, a reflection of prevailing world opinion, and member nations of the International Labour Organization who ratify them are both morally and legally bound thereby. There are exceptions for certain special industries, of course, but the weekly rest *principle* is universally unchallenged, and the exceptions regulated. As noted by the former Chief of the International Labour Organization's General Conditions of Work Branch in a recent article³: "It is only in one or two Far Eastern countries that the grant of a couple of days off a month instead of weekly rest still survives in some undertakings."

While the term "day of rest" (or "one day's rest in seven") has acquired world-wide usage, it has generally been in the context of conditions of work or labour — as meaning a time of non-work. We believe that in the context of this study, the term "day of *rest*" might be misleading, in implying the qualitative assumption that the day of

¹Weekly Rest (Industry) Convention, 1921.

²Weekly Rest (Commerce and Offices) Convention, 1957.

³Evans, "Work and Leisure, 1919-1969" (1969), 99 Int'l. Labour Rev. 3.

non-work is meant *only* for physical *rest*, when in fact the evidence before us shows that in Ontario and elsewhere the day of non-work is spent in a variety of leisure pursuits, of which physical *rest* is only one. Therefore, we prefer the more neutral term "pause day" which does not imply as many qualitative assumptions about how people will spend their day of non-work.

Having decided to describe the weekly period for at least one day of non-work as the "pause day" (a term which received wide acceptance in our public hearings), we were compelled to consider whether the weekly pause day requires legislative support in Ontario or whether it might be achieved through self-regulation as a result of custom and practice. Again, the evidence before us overwhelmingly showed there was a need for legislative support for the creation and preservation of a weekly pause day, since many industries would not voluntarily regulate themselves on this question. Protective labour legislation of this sort has been necessary in most jurisdictions in the western world, and Ontario would appear to be no exception.

The next question in logical progression was substantially more difficult: should the weekly pause day, as supported by law, be one specific day for practically all people in Ontario, or should it be a "staggered" or "floating" pause day, according to some arrangement worked out in various industries, businesses, communities or professions? The arguments for a staggered pause day are initially attractive when one is reminded of the crowded recreational and entertainment facilities and the busy highways on most weekends in Ontario as compared with their lighter use on weekdays, and considers the possibility that a staggered pause day system would permit a more even distribution in the use of these facilities. However, these arguments soon become overtaken by countervailing considerations: the problems of coordinating pause days among a family and friends in a staggered system, particularly where there are children of school age; the difficulties of holding "community" events particularly during the daytime where large numbers of persons may get together for a particular recreational or social purpose; or indeed, the simple fact that a majority of persons actually prefers to spend their pause day *together* with family, friends or even among crowds, rather than in solitude. We have no hesitation in placing a higher priority on these latter considerations since they are based more on fundamental societal needs rather than on individual convenience.

The main issue in 1970 is *not* whether there should be a pause day in the weekly work cycle. That battle was fought and won many years ago, and there are few employees today who do not have at least one day a week free from work. The main issue now is *when* that pause day shall be enjoyed. The timing is all important for dependent on it is the nature and extent of *group* activities related to leisure, whether among families, friends or less homogeneous assemblies of people in society.

Traditionally in Ontario, uniform statutory holidays and most evenings have provided working people with additional opportunities for group activities related to leisure. However, through an increasing commercial competitiveness and the convenience demands of retail consumers who are unable or unwilling to shop during the traditional daytime hours Monday–Saturday, there is a fast-growing trend toward wide-scale store openings both on statutory holidays and during every evening from Monday through Saturday. Related to this are the increased demands on ancillary service industries required to supply these stores at these times. Also of significance is the trend toward automation in many manufacturing and production industries, requiring the continuous operation of facilities for reasons of both technical and economic necessity. All this extracts a heavy social toll from those many persons who are required to work at times previously set aside for group leisure activities. Moreover, the environment in which the remaining group leisure activities are carried on is altered significantly as a result of this added commercial activity.

Thus while our productive capacity and economic standard of living continue to increase in Ontario, our collective opportunity for the more intangible benefits of participation in leisure activities *together* with family, friends and others in society continues to decrease. It is in the light of this continuing erosion of statutory holidays and evening hours that we consider it absolutely essential that the government now attempt to preserve at least one uniform day each week as a pause day, before it is too late.

Already, a few jurisdictions, particularly in the U.S.A., have adopted or fallen into a *de facto* staggered system in certain large-scale industries such as retail selling and some forms of manufacturing (see Appendix III). But we have no doubt that the great majority of the people of Ontario would prefer their pause day to be the same as that of their family and friends. Therefore, we would propose that support be provided through legislation for a *uniform* pause day for as many persons as possible, at least insofar as will preserve the character and environment of that day as being one of non-work to permit leisure activities among family and friends.

We found substantial support for this position in the briefs and at the public hearings, and also in the various attitudinal surveys and behavioural interviews conducted. The following views of the Ontario Medical Association were typical:

The feeling of our Association is that as one-third of the current working force is made up of women, the large majority of whom are married, and as we, and undoubtedly society at large, continue to insist on the importance of maintaining the integrity of the family unit, the suggestion of a staggered pause day, while it might be expedient to some problems of individuals or institutions, would be in our opinion extremely destructive to the family unit and hence to the psychiatric well-being of its members. One could readily imagine a situation where the father was off Tuesday, mother Thursday, and the children on the

weekend. It does not take much imagination to suggest that this would substantially damage the strength of the family unit. We would, therefore, strongly support maintaining a uniform pause day throughout the province.⁴

These views were substantiated by virtually all of the labour, church, retailing and consumer groups who appeared before us. Even the Ontario Parks Association, which acknowledged the extraordinarily heavy Sunday demand on park facilities (e.g., over two-thirds of those using the Conservation Areas under the jurisdiction of the Metropolitan Toronto Conservation Authority do so on Sundays), considered the expedience of a staggered pause day to their facilities as *secondary* to the preservation of *family* recreation opportunities permitted only through a *uniform* pause day.

In the light of all the evidence before us, we would reject the notion of a staggered pause day on a universal basis, and propose legislative support for a uniform pause day.

B. WHICH DAY?

Having proposed that the pause day should be uniform as far as possible, we were then constrained to ask which day should be so designated. This task was more difficult than one might expect, not because there was much doubt that the uniform pause day should be Sunday, but in providing the *rationale* for the choice. Critics of Sunday observance laws for centuries have argued that these laws were products of the "tyranny of the Christian majority" in the western world, and that they were merely a form of state recognition of and support for the divine Christian precept of the Lord's day. Of course the titles of the present federal and Ontario legislation have done nothing to discourage this claim.

Theoretically, given the modern five-day working week and the usual practice of observing both Saturday and Sunday as days of non-work in most industries except retailing, it might seem equally logical to adopt Saturday as the one to receive government support as a day of pause. Yet the adoption of Saturday would not be in accordance with the traditions, customs and practices followed by the vast majority of Ontarians for many years — wherein Saturday has been regarded as a retail shopping or market day when many persons who worked Monday to Friday looked after their weekly needs, while Sunday is the day of pause set aside for leisure pursuits, resting and relaxing or for religious observance. To suggest a day other than Sunday as a uniform day of pause for Ontario society would be to ignore history.

Sunday as a day of religious observance in Ontario appears to be decreasing in significance, if church and Sunday school attendance on that day is any indication. But this does not mean that Sunday is

⁴Extracted from a letter dated February 16, 1970 received from Dr. Glenn Sawyer, General Secretary of the Ontario Medical Association.

losing its significance as a pause day — characterized by a high degree of social interaction and leisure activities among family and friends. Indeed, our behavioural research revealed that Sunday in Ontario in 1970 has these latter characteristics to a very high degree, certainly more so than on any other day of the week. We would therefore regard the singling out of Sunday as the day for government support as consistent with the promotion of these characteristics.

It would be naive for us to suggest that the selection of Sunday had no significance for religious observance in the province. The Christian tradition of observing the Lord's day has been very much a part of the history of this province, as it has in all the other Canadian provinces and indeed in most countries of the western world. Yet this does not mean necessarily that modern legislation supporting a pause day on Sunday need be religious in purpose or effect, just because Sunday is the day chosen. This is particularly true if Sunday pause day legislation actually *facilitates* social interaction and leisure activities among all persons on the day of non-work, clearly marking it as secular and not religious legislation. Under these conditions, Sunday would then be a Christian religious day *only* for those who choose to treat it as such and spend it in whole or in part in appropriate religious observance.

The selection of Sunday as a uniform pause day does have an *incidental* religious effect. Yet this should not be considered undesirable when 96% of Canadians in the 1961 census admitted to being at least nominally Christian, and when in Ontario at least a substantial minority of the population attends a Christian church regularly on Sundays. The secular selection of a pause day, therefore, might better be Sunday than any other day for this puts the option of spending the day in a religious way, in whole or in part, at its maximum level of usefulness in Ontario society as it is composed today. However, this does not mean that anyone is being compelled to engage in Christian religious observance, particularly if there are a number of secular avocational options open as to how to spend the day.

Having acknowledged the incidental religious effect of the selection of Sunday as the uniform pause day, we have no hesitation in asserting that the secular aspects of Sunday in Ontario — a day of non-work characterized by social interaction and leisure pursuits among family and friends — have become more significant for a majority of Ontarians than the religious aspects. Of course, the secular and religious aspects often coalesce in the views of many people, particularly in activities relating to the family. But this does not mean that the secular aspects suddenly become religious just because they happen to be similar to those considered a part of the Christian ethic.

There are very few countries in the world in which Sunday has not been chosen as the uniform pause day by legislation. Yet many of these countries would hardly characterize their legislation

as "Christian" or "religious" in nature. The U.S.S.R., for example, established Sunday as the pause day (or "day off") by an edict of the Praesidium of the Supreme Soviet in 1940. We were told by the Canadian Ambassador in Moscow that Sunday is officially a day of rest, recreation, cultural education, amusement and political activity.⁵ The basic labour law of the Socialist Federal Republic of Yugoslavia recognizes Sunday as a day of rest subject to municipal regulation, and violations of municipal ordinances respecting Sunday work are subject to fines.⁶ Even in Japan, a country where Christianity has never been more than a minor religion, three separate government regulations exist requiring Sunday to be a day of rest, the first promulgated in 1876 relating to public servants, the second in 1922 relating to business hours at government agencies, and the third in 1949 respecting the 1922 regulation and adding that officials should be on duty every day except holidays and Sundays.⁷ We were advised by the Canadian Ambassador in Japan that Sunday is not a working day except for people in service industries and retail merchandising, but neither is it a day of religious observance.⁸

In short, there are sufficient precedents throughout the world for the legislative selection of Sunday as a uniform pause day for *secular* rather than *religious* purposes. For the reasons outlined, we would propose that this practice be followed in Ontario.

C. THE PRIMARY PURPOSE AND EFFECT OF LEGISLATION

Simply put, we believe that the legislative preservation of a Sunday pause day in Ontario should be *secular* in both purpose and effect. Religious considerations, while important in the voluntary practices and customs of many persons in this province, should not directly influence or determine specific provisions or the scope of the legislation.

The institution of Sunday, as a pause day for social interaction and leisure activities among family and friends, should stand on its own legislative feet without having to rely on state support for the divine Christian precept of the Lord's day. This is not to suggest that we oppose Sunday being spent as a religious day; quite the contrary. It means merely that we do not consider it desirable in 1970 that the state legislate support for any religion, regardless of whether its adherents form the majority of the population or not. The increasing diversity in beliefs (or non-beliefs) and socio-cultural background among Ontarians and indeed the religious pluralism which historically has characterized the Canadian people make it inappropriate for the state to provide legislative support for any one religion or morality, particularly where it is done at the expense of another.

⁵Letter dated March 24, 1970 from R. A. D. Ford, Canadian Ambassador in Moscow.

⁶Information provided by the Consul General of the Socialist Federal Republic of Yugoslavia in a letter dated April 24, 1970.

⁷These regulations were described in a letter dated February 18, 1970 from H. O. Moran, Canadian Ambassador in Tokyo, who was assisted by Professor J. Toshio Sawada of the Law Faculty at Sophia University.

⁸*Ibid.*

In any event, we are sceptical as to whether any law can effectively compel virtue. At best, law can merely prevent and regulate activities which are deemed to be prejudicial to the welfare of the community in general. This limitation of law as an instrument of social ordering is reminiscent⁹ of the distinction which Professor Lon Fuller of the Harvard Law School makes between the "morality of aspiration" and the "morality of duty".¹⁰ The former is conduct at the top of the scale of human achievement — the morality of the Good Life, of excellence, of the human being functioning at his best. The latter is at the bottom of the scale — the basic rules without which an ordered society is impossible, the basic requirements of social living. Professor Fuller's position is clear: "There is no way by which the law can tell a man to live up to the excellences of which he is capable. For workable standards of judgment the law must turn to its blood cousin the morality of duty."¹¹

It has been said many times that it is impossible to make men moral by an Act of Parliament. Indeed, when the state has tried to compel through law the morality of aspiration, it has often deprived individual citizens of many of the fundamental freedoms which we cherish in a parliamentary democracy and without which spiritual life is impossible. It is only the minimum morality of duty with which the state through law can be directly concerned — the necessities of public order and general welfare — and not the moral "improvement" according to standards determined by the majority.

In any event, the trend by government toward secularization in our twentieth century society has been evident in a number of important areas, such as limitations on financial support for denominational universities and schools and the recognition of the legal right of an individual to have no religion (i.e., freedom of conscience).¹² We think that Sunday legislation is another area where the state must put religious considerations aside in pursuing legitimate secular objectives considered necessary to the minimum well-being of the people.

What are the secular objectives of the type of Sunday pause day legislation which we envisage for Ontario? Essentially, they are two: (1) to create and preserve a "quality" environment in which the

⁹We are indebted to Sir Philip Phillips who first drew attention to Professor Fuller's work as relevant to Sunday observance legislation, in his Report of the Board of Inquiry on Sunday Observance in Tasmania (1967), p. 5.

¹⁰See Fuller, *The Morality of Law* (1963), pp. 5-32.

¹¹*Ibid.*, p. 9.

¹²For example, *The Saskatchewan Bill of Rights*, R.S.S. 1965, c. 378 (first enacted in 1947), section 3 declares the right to "freedom of conscience, opinion and belief, and freedom of religious association, teaching and practice". The Canadian Charter of Human Rights, proposed by the federal government in 1968 in the current review of the constitution in Canada contained a provision which would expand the term "freedom of religion" to include "freedom of conscience" to protect the freedom of the person who chooses to have no religion. In *R. v. Leach, ex parte Bergsma*, [1966] O.R. 106, the Ontario Court of Appeal held that lack of religious belief was not a ground upon which a Citizenship Court can dismiss an application for citizenship under the *Canadian Citizenship Act*, R.S.C. 1952, c. 307, notwithstanding that said Act prescribes an oath of allegiance ending "So help me God".

great majority of Ontario residents will have at least one day a week for recreation and fulfilment with their family and friends through leisure pursuits of their own choosing; (2) to ensure that as many persons as possible will be protected from being required to work on Sundays against their will. In these, we seek both to preserve a social environment for leisure and to protect labour.

For the most part, these two secular objectives are consistent with each other, i.e., to engage in leisure pursuits with family and friends on the pause day, a person must be free from work. Where the two conflict, however, is in respect of leisure activities which require substantial employment of people on the pause day in order to make leisure facilities available. Professional sports, libraries and symphony concerts are three cases in point. If we were to propose that the sole objective of Sunday laws was to free persons from work on that day, then this well might deprive thousands of people of any leisure activities whatsoever on Sundays. This might then result in a situation where Sunday pause day legislation would have the appearance of compelling religious observance since the scheme would be marked by an absence of options available to non-Christians who did not choose to spend the day at worship, or in the home, or in activities not involving the provision of services by other people.

What is required in areas where the two objectives conflict is a utilitarian balancing of the competing claims between a quality environment and the protection of labour, to provide the greatest good for the greatest number. Recognizing that "good" in itself involves qualitative judgments, an application of this approach would involve a determination of what activities are conducive to social interaction and leisure pursuits on the pause day, at the same time keeping an eye on any hardships inflicted upon those persons who will have to be employed on the pause day to provide the activities. Ideally, these judgments might be best made on a case by case basis, but this would create practical difficulties in the drafting of legislative guidelines and would have the appearance of arbitrariness. We believe that it is possible to categorize generally activities which are, or are not, consistent with the foregoing secular objectives of the Sunday pause day, and to provide methods of regulation. This is essentially what we will attempt in Chapters 11-15.

D. THE TITLE OF THE LEGISLATION

A matter which must be considered here is the title which secular pause day legislation might carry should the Legislature of Ontario choose to adopt the approach which we have outlined. The title of a statute after all is the most obvious indicator to the public of its purpose and effect. Both the present federal and provincial legislation carry the title *Lord's Day Act* which, as already noted, does little to discourage the widely-held view that it is religious legislation. Some of the other provinces use the title *Sunday Observance Act*. While this is more neutral in tone, the word "observance" is still construed by many as meaning "religious observance", and carries a connotation of compulsion.

In Chapter 3, we noted that in 1906, the Senate unsuccessfully attempted to change the name of the *Lord's Day Act*, prior to its enactment, to "An Act respecting Sunday". Had this succeeded, the federal Act would have become known as the "Sunday Act", and the term "Sunday" would have been substituted for the term "Lord's day" throughout. This title is relatively free of the religious inferences that have been attributed to the present Sunday legislation in Canada and elsewhere, and is consistent with the objectives for secular pause day legislation which we have outlined.

A title which might better express the two secular objectives which we have proposed is "The Sunday Leisure Act". This has the advantage of stating explicitly and positively what we regard as the primary objective of Sunday laws — the creation and maintenance of a quality environment for the pursuit of leisure activities among family and friends. It removes the connotation of compulsory religious observance which historically has involved the prohibition of leisure activities of a non-religious nature, yet it is still in accord with the secondary objective of protecting persons who might otherwise be forced to work on that day. To the proponents of an open commercial Sunday, this title would imply that their access to Sunday commercial facilities has been limited in order to grant employees in these facilities a common day of leisure of their own choosing. We believe that this title would accommodate the type of Sunday laws needed in Ontario not only today but many years in the future.

Another title we would consider acceptable for the above reasons is "The Sunday Rest and Recreation Act", although it is slightly more cumbersome and perhaps too specific as to how people might spend their Sunday.

Other titles available for secular pause day legislation include "The Common Day of Rest Act", "The Common Weekly Day of Rest Act", and "The Uniform Day of Rest Act" (or combinations of these). However, each of these titles, while acceptable as consistent with our two secular objectives, tends to emphasize merely the secondary objective of protecting people from being forced to work, and implies the qualitative assumption that the day of non-work is for *rest* and not necessarily for other leisure activities. For these reasons we would not propose their adoption.

E. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. Ontario should provide legislative support for a uniform weekly pause day for as many persons as possible.
2. The uniform weekly pause day should be Sunday.
3. The Ontario legislation providing support for a Sunday pause day should be secular, and not religious, in both purpose and effect.

4. The legislation should have the dual secular purposes of (a) preserving a quality environment for the pursuit of leisure activities among families and friends; and (b) ensuring that as many persons as possible will be protected from being required to work on Sundays against their will.

5. The title of the legislation should be "The Sunday Leisure Act", as a means of reflecting its secular purpose and effect. Alternative titles which might be considered are "The Sunday Act" or "The Sunday Rest and Recreation Act".

CHAPTER 10

THE CONSTITUTIONAL JURISDICTION IN ONTARIO

S U M M A R Y

- A. THE CONSTITUTIONAL BASIS OF SUNDAY OBSERVANCE
LEGISLATION AS A MATTER OF CRIMINAL LAW
- B. DERIVATIVE PROVINCIAL JURISDICTION
- C. ORIGINAL PROVINCIAL JURISDICTION
- D. THE FORM OF THE ORIGINAL PROVINCIAL LEGISLATION
- E. SUMMARY OF PROPOSALS AND ALTERNATIVES

This was one of the most difficult problems we faced in the course of our deliberations. Ever since the decision of the Judicial Committee of the Privy Council in *Attorney-General for Ontario v. Hamilton Street Railway Company*¹ in 1903, the primary jurisdiction over Sunday observance as a religious matter, has generally been considered to be vested in the Parliament of Canada as a matter of criminal law under section 91(27) of the *British North America Act*. This, of course, provided the jurisdictional basis for Parliament to enact the *Lord's Day Act*² in 1906 which has continued with only minor amendments to the present day.

Only by virtue of the clause "except as provided . . . in any provincial Act or law now or hereafter in force" in sections 4 (no sales to be made or business or work done on Lord's day), 6 (no games and performances where admission fee is charged), or 7 (no excursions by conveyances where fee is charged) of the federal *Lord's Day Act* are the provincial Legislatures derivatively empowered to legislate respecting Sunday observance as a religious matter. *The Lord's Day (Ontario) Act*,³ which permits Sunday sports, movies, concerts, fairs and horse races, is essentially derivative legislation as a "provincial Act" providing exceptions to the federal prohibitions.

But could Ontario adopt strictly secular legislation respecting Sunday as we have proposed, and would this legislation have to be derivative and thereby subject to the paramount criminal jurisdiction of Parliament, or could it have independent constitutional underpinnings flowing from several of the heads in section 92 of the *British North America Act*, namely:

- 92(a) Municipal Institutions in the Province
- 92(10) Local Works and Undertakings
- 92(13) Property and Civil Rights in the Province
- 92(16) Generally all Matters of a merely local or private Nature in the Province

¹[1903] A.C. 524.

²S.C. 1906, c. 27.

³S.O. 1960-61, c. 50; amended by S.O. 1965, c. 66, and S.O. 1968, c. 68.

A. THE CONSTITUTIONAL BASIS OF SUNDAY OBSERVANCE LEGISLATION AS A MATTER OF CRIMINAL LAW

Before attempting to answer the above questions, it is necessary to consider what Sunday observance legislation in the past has been all about and whether its judicial characterization as "criminal law" in *Hamilton Street Railway* in 1903 and in subsequent decisions would still obtain for legislation enacted for secular purposes today. We noted in Chapter 3 that from 1845 to 1948, the pre-Confederation statute entitled *An Act to Prevent the Profanation of the Lord's Day* was in force in Upper Canada, and then Ontario, until 1948. Likewise, the English *Sunday Observance Act* of 1780 forbidding public entertainments on Sunday was in force until 1948. These statutes clearly had the overriding religious purpose of promoting the strict Christian view of appropriate conduct for the Lord's day, mainly a matter of prohibition, so far as public law could be used to pursue that object. This strict view was that, as a matter of Christian religious obligation, Sunday was a holy day of rest *from* activities, words and thoughts concerned with worldly employment, leisure and recreation. Rather, the day was to be spent wholly in public and private worship, with exceptions permitted only if they were deemed to be "works of necessity or charity".

There was an obvious negative pattern in this legislation. The main prohibition forbade the carrying on of worldly vocations on Sunday, that is, ordinary secular employments, professions and businesses, including sales by retail merchants, but saving works of necessity or charity. Equally forbidden was a long list of secular avocational activities, including a rather comprehensive catalogue of leisure activities and recreations. Examples were hunting, fishing, certain athletic contests or games, the opening of and resort to taverns, or to other places of entertainment where admission fees were charged, and so on. In the *Hamilton Street Railway* case in 1903, the Judicial Committee of the Privy Council, overruling the majority of the Ontario Court of Appeal, held the Ontario legislation on the profanation of the Lord's day to be invalid (this was the 1897 version which was little changed from the original 1845 Act). They stated that "treated as a whole", it was *ultra vires* the Ontario Legislature and within the exclusive jurisdiction of the Parliament of Canada as "criminal law" within section 91(27) of the *B.N.A. Act*.

The decision of the Judicial Committee has been repeatedly applied concerning legislation *having the same scheme and system*,⁴ i.e., purporting to prevent profanation of the Lord's day. While the federal *Lord's Day Act* of 1906 did not list forbidden things in such detail as the invalid Ontario Act of 1897, it had a much longer list of works of necessity or mercy, and exhibited the same overall negative pattern, obviously and primarily for the same religious reasons. Prime Minister Laurier, when

⁴*In re Legislation Respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 583; *Ouimet v. Bazin* (1912), 46 S.C.R. 502; *Lord's Day Alliance of Canada v. Attorney General for Manitoba*, [1925] A.C. 384; *Henry Birks and Sons (Montreal) Ltd. v. Montreal and the Attorney-General of Quebec*, [1955] S.C.R. 799; *Lord's Day Alliance of Canada v. Attorney General for British Columbia*, [1959] S.C.R. 497.

discussing the Act in Parliament in 1906, stated: "... the very basis of ... legislation of this kind must be to give ... the sanction of the positive law to the moral law and the divine law."⁵

That the constitutional validity of the Act is dependent on its religious purposes was made clear by Mr. Justice Laskin, now on the Supreme Court of Canada, writing extra-judicially in his casebook on Canadian Constitutional Law:

Of course, the *Lord's Day Act* could not be supported as valid federal legislation if it had a secular purpose; ...⁶

The federal *Lord's Day Act*, "treated as a whole", has several times been held in the highest Courts to be valid federal criminal law.⁷ A province has no power to enact a Sunday observance scheme of prohibitions of this type for the obviously *religious* reasons the pattern implies. Any doubt as to the lack of provincial jurisdiction respecting observance of a religious holiday was settled by the Supreme Court of Canada in the *Birks* case⁸ in 1955 wherein a Montreal bylaw which attempted to enforce store closings on certain religious feast-days was declared *ultra vires* as being in relation to criminal law.

B. DERIVATIVE PROVINCIAL JURISDICTION

If Ontario, as a religious matter, wishes changes in the existing scheme of prohibitions contained in the federal Act, it will either have to request that the federal Parliament make them, or it must proceed under the exception clause in sections 4, 6 or 7 of the federal Act: "... except as provided ... in any provincial Act or law now or hereafter in force ..." Provincial legislation under this clause which carries a religious character and exhibits the religious pattern just described must necessarily be *permissive*, and not prohibitive. It can only designate certain activities which are *not* to be profanation of the Lord's day (such as sports, movies, concerts, etc.); it cannot prohibit them for that reason. The nature of this derivative power was best described by Lord Blanesburgh for the Privy Council in *Lord's Day Alliance of Canada v. Attorney General for Manitoba*⁹ in 1925:

Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be "in force" within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular s. 1, is in that sense of these words "in force" in the Province, will be simplified if it be first asked whether

⁵ 76 H.C. Deb. (Can.), at cols. 5638-5639.

⁶ Laskin, Canadian Constitutional Law (3rd ed., 1967), p. 860.

⁷ The most recent case in the Supreme Court of Canada in which this position was asserted was *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, (per Ritchie, J.) although the major issue there was whether the Canadian Bill of Rights effectively repealed section 4 of the *Lord's Day Act*, or rendered it ineffective. The majority held that it did not.

⁸ *Henry Birks and Sons (Montreal) Ltd. v. Montreal and the Attorney-General of Quebec*, [1955] S.C.R. 799.

⁹ 1925 A.C. 384.

or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of *Attorney-General for Ontario v. Hamilton Street Ry. Co.* decision, which they conceive is not admissible. The Board, dealing there with the Ontario Act as a whole—as an Act which created offences and imposed penalties for their commission—held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognize what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is not part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting “civil rights in the Province” or as one of “a merely local nature in the Province.” Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other.

This view of the federal exception clause was followed and approved in the Supreme Court of Canada in *Lord's Day Alliance of Canada v. Attorney General for British Columbia*¹⁰ in 1959 wherein a provincial bill permitting Sunday sports from 1.30-6 p.m. by local bylaw as an exception to the federal *Lord's Day Act* was unanimously upheld by the Court.

In retrospect, the Honourable Allen B. Aylesworth, who had piloted the original *Lord's Day Act* through the House of Commons in 1906, would appear to have anticipated accurately the subsequent judicial response to the exception clause, as reflected in his comments in 1906 prior to the bill's enactment:

That is by no means delegating our legislative power to a provincial legislature, it is simply saying that we do not choose to declare that thing to be criminal or unlawful which a provincial legislature has, so far as that province is concerned, either in the past or may in the future, declare to be a right of a citizen of that province.¹¹

¹⁰[1959] S.C.R. 497.

¹¹77 H.C. Deb. (Can.) at col. 6592.

Clearly the exception clause in sections 4, 6 and 7 of the federal *Lord's Day Act* is not an invalid delegation of the type ruled unconstitutional in the *Nova Scotia Interdelegation Case*¹² in 1951. It is a waiver by the federal Parliament of its paramountcy respecting the determination, as a matter of criminal law, of what does or does not constitute profanation of the Lord's day. Put another way, it allows a province to legislate for the non-observance of Sunday as a religious day. Parliament can withdraw the waiver at any time and any permissive provincial legislation passed under it would thereby become suspended. This would certainly be the case with *The Lord's Day (Ontario) Act* and the Sunday observance statutes in most of the other provinces, which are permissive in form. If provincial legislation is prohibitive in form as religious legislation, it would be criminal law and hence *ultra vires*. But in a permissive form it is religious legislation on civil rights and local matters. It is, so to speak, a small island of permission in a federal sea of prohibitions defining profanations of the Lord's day, with the island taking its religious character from the sea. As such a provincial permission has the effect of putting the designated activity outside of the federal *Lord's Day Act*.

C. ORIGINAL PROVINCIAL JURISDICTION

But what if, as we have proposed, a province were to pass *secular* Sunday legislation completely devoid of religious considerations? Does a province have any *original* jurisdiction respecting activities on that day? And could it enact *prohibitive* and *regulatory*, as well as permissive, legislation respecting Sunday activities?

It has been established for many years that the provinces have jurisdiction generally to regulate the closing of shops,¹³ the hours of labour in all provincial industries and businesses,¹⁴ and through licensing the mode of operation of provincial industries and businesses.¹⁵ Could the provinces regulate these matters on Sundays as part of the secular scheme for that day, or at least as part of a secular scheme for every day of the week, but with different conditions applying on Sunday? Put another way, would the singling out of Sunday for separate legislative treatment as a secular matter be an invasion of the federal Parliament's criminal law jurisdiction and meet the same fate as the 1897 Ontario "profanation" statute met in *Hamilton Street Railway* in 1903?

The Courts have not given definitive answers to these questions. However, they have given some indication that provincial legislation respecting Sundays which is not of the "profanation" type would be constitutionally valid as long as it were properly framed. In *Hamilton Street Railway* in 1903, the members of the Judicial Committee of the

¹²[1951] S.C.R. 31.

¹³*City of Montreal v. Beauvais* (1909), 42 S.C.R. 211. See also *Bowring Brothers' Ltd. v. Ennis* (1958), 16 D.L.R. (2d) 516 (Nfld.) for a modern application of this decision.

¹⁴*Reference Re Hours of Labour*, [1925] S.C.R. 505; *Attorney-General of Canada v. Attorney-General for Ontario* (Labour Conventions case), [1937] A.C. 326.

¹⁵*Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Attorney-General of Manitoba v. Manitoba Licence Holders' Association*, [1902] A.C. 73.

Privy Council had before them the dissenting judgment of Chief Justice Armour in the Ontario Court of Appeal which it is reasonable to take into account in interpreting the Judicial Committee's judgment, and from which it clearly appears that the Chief Justice did *not* intend to express the opinion that the province had no power to legislate upon the subject.

As to question 1, I am of the opinion that the legislature of Ontario had no jurisdiction to enact R.S.O. 1897 ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day", *in its present form and to the full extent of its provisions*.

The profanation of the Lord's Day is an offence against religion, and offences against religion are properly classed under the limitation "crimes", and consequently the enactment of laws to prevent the profanation of the Lord's Day, and imposing punishment therefor by fine, penalty, or imprisonment, properly belongs to the Parliament of Canada under sub-sec. 27 of sec. 91 of the British North America Act, and *to this extent* ch. 246 is beyond the power of the Legislature of Ontario. [emphasis added]¹⁶

Then in 1912, in the case of *Ouimet v. Bazin*,¹⁷ Mr. Justice Duff, as he then was, made the distinction between federal religious legislation and provincial secular legislation respecting Sundays. The Court in that case, declared *ultra vires* a provision in a Quebec statute entitled *An Act respecting the observance of Sunday* which followed the historical profanation of the Lord's day pattern. Mr Justice Duff had this to say:

The Quebec statute which is impeached on this appeal professes to create offences which, in my opinion, if validly created would be offences against the criminal law within the meaning of section 91, sub-section 27, of the "British North America Act". *The enactment appears to me, in effect, to treat the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and to declare them punishable as such.* Such an enactment we are, in my opinion, bound to hold, on the authority of *The Attorney-General v. Hamilton Street Railway Co.*, to be an enactment dealing with the subject of the criminal law.

It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion upon the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament. But it may be noted that since the decision of the Judicial Com-

¹⁶Extracted from the judgment of the Ontario Court of Appeal, April 14, 1902.

¹⁷(1912), 46 S.C.R. 502.

mittee in *Hodge v. The Queen*, it has never been doubted that the Sunday closing provisions in force in most of the provinces affecting what is commonly called the "liquor trade" were entirely within the competence of the provinces to enact; and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-section 15 of section 92 of the "British North America Act". [emphasis added]¹⁸

In *Hodge v. The Queen*¹⁹ in 1883, the Ontario *Liquor Licence Act* of 1877 was held to be valid provincial legislation as "municipal regulations of a merely local character" under heads (8) and (16) of section 92 of the *B.N.A. Act*. Among other things, the provincial statute provided for compulsory Sunday closing of taverns, and its many prohibitive and penal features were held valid under head (15) of section 92.

A subsequent line of cases,²⁰ upholding the constitutional validity of municipal Sunday closing bylaws for certain business establishments, provides additional support for provincial jurisdiction respecting secular Sunday legislation. While most of the municipal bylaws in those cases also contain provisions regulating business hours for other days of the week as well as Sunday, the prohibitions or regulations for Sundays were generally stricter than for weekdays. In two of the cases,²¹ the prohibitions or regulations applied *only* to Sundays.

The Supreme Court of Canada upheld the constitutional validity of a Sunday bylaw in the case of *Lieberman v. The Queen*²² in 1963.

¹⁸ *Ibid.*, at pp. 525-526.

¹⁹ (1883), 9 App. Cas. 117. In *R. v. Court of Sessions of the Peace, ex parte Pilon* (1964), 45 D.L.R. (2d) 59, the Quebec Court of Appeal upheld a section of the *Quebec Liquor Board Act* which restricted, *inter alia*, the sale of alcoholic beverages with meals in cabarets to the hours of 6 p.m.—midnight on "holidays" (defined as including "Sundays, New Year's Day, Good Friday, and Christmas Day"). Hyde, J., for the Court, stated that the limitations on Sunday trade in this field occasioned by the section in question were incidental to the general control of that trade, and were not directed towards the prevention of the profanation of the Sabbath. In addition, he stated that the section in question was not to be read in isolation from the rest of the statute, and in any event the section referred to holidays other than Sunday which could not be ignored as accepted holidays or days of rest in the regulation of the sale of liquor. To him, an important object of the legislation was the curbing of intemperance and the protection of the public from those who would drink to excess, and the limitations on Sunday trade were ancillary and incidental to such purposes.

²⁰ *R. v. Southern Garage (1959) Ltd.* (1963), 39 D.L.R. (2d) 408 (Alta. C.A.) (service stations); *Henderson Thriftway Petroleum Ltd. v. Reeves* (1956), 3 D.L.R. (2d) 507 (Man. C.A.) (service stations); *R. v. Bachynski*, [1938] 2 D.L.R. 691 (Man. C.A.) (dance halls); *R. v. Epstein*, [1931] O.R. 726 (miniature golf courses); *O'Brien v. Royal George* (1921), 57 D.L.R. 301 (Alta. C.A.) (tavern licensees). But see, contra: *St. Prosper v. Rodrigue* (1917), 56 S.C.R. 157 (restaurants); *R. v. Waldon* (1914), 18 D.L.R. 109 (B.C.C.A.) (sale of goods); *R. v. Slowin*, [1923] 1 W.W.R. 252 (B.C.) (discharge of firearms within the city); *Clarke v. Wawken*, [1930] 2 D.L.R. 596 (Sask. C.A.) (dance halls); *Connaught Park Jockey Club v. District Magistrates Court and Township of South Hull* (1965), 51 D.L.R. (2d) 559 (Que. Super. Ct.) (horse races); and *La ville de Montréal v. La salle de danse "Dans le vent"*, [1965] R.L. 365 (dance halls).

²¹ *Re Gregory and City of Hamilton*, [1942] 4 D.L.R. 735 (Ont. C.A.) (facilities for entertainment and amusement); *Re Karry and City of Chatham* (1910), 21 O.L.R. 566 (Ont. C.A.) (restaurants).

²² 1963 S.C.R. 643. See Lysyk, "Case Comment" (1964) 2 U.B.C.L. Rev. 59.

There, a bylaw of the city of St. John, New Brunswick, prohibiting public billiard or pool room or bowling alley openings between midnight and 6 a.m. weekdays and all day Sunday was unanimously upheld by a seven-man Court because it was primarily concerned with secular matters. Speaking for the Court, Mr. Justice Ritchie said:

The matter of hours at which shops of a specified class shall close in particular localities in a Province is *prima facie* within the jurisdiction of such Province under head 16 of s. 92 of the *B.N.A. Act*. As was said by Duff, J., in *City of Montreal v. Beauvais* (1909), 42 S.C.R. 211 at p. 215, it "is a matter which is substantially of local interest in the province and which in itself is not of any direct or substantial interest to the Dominion as a whole".

It has, however, been accepted since the decision of the Privy Council in *A.-G. Ont. v. Hamilton Street R. Co.*, 7. C.C.C. 326, [1903] A.C. 524, that legislation intended for the purpose of preventing the profanation of the Sabbath is a part of the criminal law in its widest sense and is thus reserved to the Parliament of Canada by s. 91(27) of the *B.N.A. Act* and the immediate question raised by this appeal is whether it can be said that the impugned by-law has for its true object, purpose, nature and character the preservation of the sanctity of the Sabbath or whether it is directed to the merely local matter of regulating the hours when certain licensed businesses are to close in the City of Saint John.

In this regard, the submission for the appellant is succinctly stated in the first paragraph of the argument outlined in the *factum* filed on his behalf as follows:

It is submitted that the by-law in question is invalid on the ground that it purports by the simple words "or on Sunday" to deal with matters of morals or religious observance which fall within the exclusive legislative jurisdiction of the Parliament of Canada.

The prohibition against keeping public billiard rooms, pool rooms and bowling alleys open during the hours specified in s. 3 is not to be read in isolation from the rest of the by-law and when the enactment is read as a whole it will be seen that the impugned section is but one of a number of regulations which the common council has imposed upon the operators of such businesses in the City of Saint John. The nature of the restrictions so imposed by the common council appears to me to reflect nothing more than the opinion of that body as to the manner in which such businesses are to be carried on for the better government of the city.

It is not to be lightly assumed that any part of the by-law is directed to a purpose beyond the legislative competence of the enacting authority and I do not think that the inclusion of Sunday in the hours of closing of these businesses necessarily carries with it any moral or religious significance . . .

As I have indicated, I have reached the conclusion that the by-law here in question, entitled as it is "A Law to regulate and license public billiard and pool rooms and bowling alleys in the City of Saint John" and primarily concerned as it undoubtedly is with secular matters, has for its true object, purpose, nature or character, the regulation of the hours at which businesses of special classes shall close in a particular locality in the Province of New Brunswick which is a matter of a merely private nature in that Province. As I have also indicated, I am of opinion that the mere addition of the words "or on Sunday" at the end of s. 3 does not afford sufficient evidence to justify the inference that this by-law is directed towards the prevention of the profanation of the Sabbath and that it is thus beyond the ambit of provincial authority.²³

In *Robertson and Rosetanni v. The Queen*²⁴ heard in the Supreme Court of Canada the same year as *Lieberman*, the Court was not considering directly the scope of provincial Sunday legislation, but the question of whether the federal *Lord's Day Act* was in conflict with the "freedom of religion" clause in the Canadian Bill of Rights (see Chapter 8). However, in describing the constitutional basis for the existing federal legislation, Mr. Justice Ritchie, for the majority, had this to say:

There have been statutes in this country since long before Confederation passed for the express purpose of safeguarding the sanctity of the Sabbath (Sunday), and since the decision in *Attorney General for Ontario vs. Hamilton Street Railway*, it has been accepted that such legislation and the penalties imposed for its breach, constitutes a part of the criminal law in its widest sense and is thus reserved to the Parliament of Canada by s. 91(27) of the *British North America Act*. Different considerations, of course, apply to the power to legislate for the purely secular purpose of regulating hours of labour which, except as to the regulation of the hours of labour of Dominion servants, is primarily vested in the provincial legislatures. See the reference *re Hours of Labour* and *Attorney General for Canada v. Attorney General for Ontario Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours Act*.²⁵

These two statements by Mr. Justice Ritchie are the most recent indication of how the Supreme Court of Canada might react to provincial secular Sunday laws of a prohibitive or regulatory nature. There is no indication that the Court would declare invalid even a broad provincial scheme of Sunday laws as long as it dealt purely with secular matters and was properly framed as such.

Further judicial support for provincial secular Sunday laws was provided by the Quebec Court of Appeal the same year in *Richstone Bakeries*,²⁶ this case involving a provincial labour decree prescribing

²³*Ibid.*, at pp. 647-648; 649-650.

²⁴ 1963, S.C.R. 651.

²⁵*Ibid.*, at pp. 656-657.

²⁶*Regina v. Court of Sessions of the Peace, ex parte Richstone Bakeries Inc.* 1963, 40 D.L.R. (2d) 246.

Sundays and Wednesdays as non-working days for the distribution of bread in a specified area. Mr. Justice Hyde, speaking for a unanimous five-man Court, stated:

In the *Birks* case the Court found that the legislation was concerned with the observance of those particular days as Holy Days and not simply as holidays, whereas in the present instance, as the learned trial Judge properly held—

(translation) Thus the disputed enactment deals essentially with the labour agreement, does not provide a penalty for a crime and provides for a matter within provincial competence, even if one came to the conclusion, which is not the case, that this enactment in some way regulates the business or trade of bread distributors; it is therefore valid and *intra vires* of the Legislature of Quebec.

The true character and object of the decree as sanctioned by the two Orders in Council is not Sunday observance but hours of labour and the organization of a 5-day working week, which is a subject within the legislative competence of the Province as determined by the Supreme Court of Canada in the reference *Re Treaty of Versailles, Re Hours of Labour*, [1925] 3 D.L.R. 1114, [1925] S.C.R. 505. I do not think it is necessary to review the arguments by which such a contention was rejected by the Supreme Court in the *Birks* case. Obviously Wednesday has no special significance except that it comes in the middle of the calendar week and Sunday is the other logical day in view of the practice in respect thereof and the requirements of the *Lord's Day Act*, R.S.C. 1952, c. 171. Furthermore, the holidays specified in art. VI of Order in Council 85, namely, "New Year's Day, January 2, Easter Monday, the Queen's Birthday, St-Jean Baptiste Day, Confederation Day (July 1st), Labour Day, Christmas Day and December 26" do not, taken together, have the same character as those in the *Birks* case. They are generally recognizable as holidays despite the fact that two of them have religious significance.²⁷

Therefore, both with respect to the Sunday closing of business establishments and the prohibition of Sunday work, there is recent judicial authority supporting provincial jurisdiction in isolated cases where the object of the legislation has clearly been for secular purposes.

We also consider it necessary to draw attention again to existing Sunday legislative provisions in Ontario, all of which appear to have a secular object. Ontario has had a *One Day's Rest in Seven Act*²⁸ ever since 1922, requiring all employers of persons in hotels, restaurants and cafés in cities and towns with a population of 10,000 or over to allow at least one day's rest in seven, and "wherever possible . . . on a Sunday".²⁹ Employers who contravene the Act are liable to a fine. Ontario prohibits hunting on Sundays in many parts of the province

²⁷ *Ibid.*, at p. 250.

²⁸ R.S.O. 1960, c. 269.

²⁹ *Ibid.*, s. 2.

by a regulation promulgated under the authority of *The Game and Fish Act*.³⁰ A similar provision in Manitoba was declared *intra vires* by the Manitoba Court of Appeal in 1946.³¹ *The Pawnbrokers' Act*³² in Ontario prohibits a pawnbroker from carrying on business on Sunday, and violations thereof are subject to a fine. For some 67 years until 1964, *The Factory, Shop and Office Building Act*³³ prohibited employment in a bake-shop on Sunday between 7 a.m. and 1 p.m. except for necessary work preliminary to the baking process, although this rule was not applied if an employee had another day off during the week and did not work more than eight hours on Sunday.

*The Municipal Act*³⁴ provides authority for a municipality to enact bylaws providing for the closing of shops for a weekly holiday "during the whole of such day and until such time not later than 5 o'clock in the forenoon of the next following day"; a further section³⁵ of the Act provides for municipal implementation of a rotational system for retail gasoline service stations which could require such establishments to be closed between 6 p.m. Saturday and 7 a.m. Monday, but with exceptions by means of permit. Regulations under *The Industrial Standards Act*³⁶ giving effect to labour schedules in various zones for the barbering, garment and construction industries typically contain either a prohibition of Sunday work or a requirement of over-time rates of pay for work performed on that day. Until 1961, *The Theatres Act*³⁷ prohibited the operation of a movie house on Sunday. *The Judicature Act*³⁸ prohibits service and execution of legal process on the

³⁰S.O. 1961-62, c. 48, s. 83(22) and O. Reg. 409/69.

³¹*R. v. Paling*, [1946] 3 D.L.R. 54.

³²R.S.O. 1960, c. 290, s. 25(1)(d).

³³R.S.O. 1960, c. 130, s. 65(2)(3); repealed by *The Industrial Safety Act*, S.O. 1964, c. 45, s. 39.

³⁴R.S.O. 1960, c. 249; amended by S.O. 1961-62, c. 86, s. 43, adding, *inter alia*, s. 379a(5):

(5) The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops in the municipality shall be closed and remain closed on one particular day of the week during the whole of such day and until 5 o'clock in the forenoon of the next following day.

³⁵*Ibid.*, s. 379b(a,b,c):

379b. In addition to any matter authorized by section 379a, any by-law thereunder applicable to retail gasoline service stations, gasoline pumps and outlets in the retail gasoline service industry as defined in *The Industrial Standards Act* may,

- (a) provide that the by-law shall apply only in the part or parts of the municipality designated in the by-law;
- (b) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between 6 o'clock in the afternoon of any day and 7 o'clock in the forenoon of the next following day and between 6 o'clock in the afternoon on Saturday and 7 o'clock in the forenoon of the next following Monday; and
- (c) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.

³⁶R.S.O. 1960, c. 186; amended by S.O. 1964, c. 46.

³⁷R.S.O. 1960, c. 396, s. 16.

³⁸R.S.O. 1960, c. 197, s. 126.

Lord's day, and renders any such service and execution void and the person so serving is liable to civil suit at the incidence of the party grieved. *The Judicature Act*,³⁹ *The County Courts Act*,⁴⁰ and *The Surrogate Courts Act*⁴¹ all require their respective Court offices to remain closed on "holidays", which term includes Sunday according to *The Interpretation Act*.⁴²

All these provincial Sunday prohibitions or regulations would appear to be of a *secular* nature as part of the broader regulation of fields of activity falling within provincial jurisdiction under section 92 of the *British North America Act*. The secular Sunday provisions are merely incidental to the broader regulatory scheme in each case. However, the provisions relating to Sunday do entail a different legislative treatment for Sundays than other days of the week, and to that extent Sunday is singled out.

In view of the judicial authorities which we have discussed and the extent of existing regulatory provisions relating to Sunday in this province, there would appear to be little doubt that a province can legislate Sunday provisions respecting provincial fields of activity within either a prohibitive or regulatory framework, as well as a permissive framework. The issue which is not entirely clear, however, is whether a *plenary* legislative scheme in a prohibitive or regulatory framework could be enacted pertaining to Sunday, *qua* Sunday, as a day which, for *secular* reasons, is to receive different legislative treatment than other days of the week. Again we return to the crucial question: can Sunday be singled out by a province for secular legislative treatment as a special day, or does the fact that Sunday is the day of primary religious observance for Christians disqualify it for such a plenary scheme, no matter how secular it might be?

On the basis of the law as we have construed it, it is our opinion that a province can legislate a *plenary* secular scheme respecting Sundays, and that this legislation can take a prohibitive as well as permissive form as long as it is carefully drawn to achieve secular and not religious objectives. This legislation can be enforced by means of penalties and fines through the province taking advantage of head (15) of section 92 of the *B.N.A. Act*.

But this does not solve all the constitutional difficulties. What, for example, if the province were to enact a plenary Sunday scheme for the secular objectives which we have proposed in this chapter, and the legislation was to contain provisions which in effect overlapped, duplicated or conflicted with the existing prohibitions or permissions under the federal *Lord's Day Act*? This is a most difficult question, but it is not one incapable of solution under existing theories of constitutional interpretation adopted by the Courts in Canada.

³⁹*Ibid.*, s. 91 (now repealed and replaced by *An Act to Amend the Judicature Act*, s. 10, Bill 183 of the 3rd Session, 28th Legislature, which received Royal Assent and came into force on November 13, 1970).

⁴⁰R.S.O. 1960, c. 76, s. 6 (now repealed and replaced by *An Act to Amend the County Courts Act*, s. 1, Bill 184 of the 3rd Session, 28th Legislature, which received Royal Assent and came into force on November 13, 1970).

⁴¹R.S.O. 1960, c. 388, s. 16.

⁴²R.S.O. 1960, c. 191, s. 30(10).

Simply put, our position is that there is an area of implied concurrency or overlap⁴³ in the area of Sunday laws between the federal criminal law power on the one hand, and the provincial powers over civil rights and local matters on the other. Normally, if there is a conflict between federal and provincial laws in a concurrent area, then federal paramountcy obtains and the federal legislation takes effect with the inconsistent provincial legislation becoming suspended.⁴⁴ However, if the provincial Sunday legislation merely supplements the federal *Lord's Day Act* or duplicates it as part of a broader secular scheme,⁴⁵ then the federal and provincial Sunday legislation can live together, each having entered the field through separate constitutional "gates of entry".⁴⁶

The latter situation is the one that prevailed in the *Lieberman* case discussed earlier. As noted by Mr. Justice Ritchie:

Nor do I think that it can be said that s. 3 of the by-law is inoperative as being in conflict with the *Lord's Day Act*. The licensing power vested in the Provinces by s. 92(9) is not limited to the shop, saloon, tavern and auctioneer licences specified in that section, and if that power is exercised in respect of a merely local matter and in a manner which is not repugnant to Federal or provincial law the provincial authority is, in my opinion, entitled to attach such conditions and impose such penalties as it may see fit in respect to the manner in which the persons so licensed shall conduct the businesses which are the subject of such licences. The fact that one or more of the conditions so imposed is in conformity with legislation validly passed by the Federal Government in no way invalidates the by-law.

What was said by Judson, J., in *O'Grady v. Sparling*, 25 D.L.R. (2d) 145, 128 C.C.C. 1, [1960] S.C.R. 804, concerning the alleged conflict between s. 55(1) of the *Highway Traffic Act* of Manitoba and s. 221 of the *Cr. Code* appears to me to have direct application to the conflict here alleged between the by-law and the *Lord's Day Act*. He there said at p. 160 D.L.R., p. 16 C.C.C., p. 811 S.C.R.:

There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject-matters and are for different purposes.

⁴³See Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada", (1962-63) 9 McGill L.J. 185.

⁴⁴For example, see *R. v. Simpson, Mack and Lewis* (1969), 1 D.L.R. (3d) 597 in which the British Columbia Court of Appeal invalidated a section of the provincial *Health Act* which made it an offence to possess the substances LSD or marijuana because the federal *Food and Drugs Act* and the *Narcotics Control Act* dealt with substantially the same matters.

⁴⁵Examples of cases where provincial supplementing legislation has been upheld are listed *infra*, at footnotes 48-51.

⁴⁶This useful phrase was coined by Mr. Justice Laskin, then of the Ontario Court of Appeal, in the recent case of *Papp v. Papp* (1970), 8 D.L.R. (3d) 389 in which he sustained the constitutional validity of the custody provisions of the federal *Divorce Act* notwithstanding that jurisdiction over custody of children resided in the province in the absence of conflicting federal legislation.

And later in the same paragraph:

Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative.⁴⁷

The decision of *O'Grady v. Sparling* is one of the leading authorities for the theory of implied concurrency or overlap, and is an example of a number of "driving cases"⁴⁸ where provincial legislation, for *provincial* purposes, has been sustained in the face of existing federal legislation appearing to cover the same area, but for *federal* purposes in the field of criminal law. Other areas where the theory has been applied relate to child welfare,⁴⁹ food and drugs,⁵⁰ and securities regulation.⁵¹ The statement by Mr. Justice Duff in *Ouimet v. Bazin*, cited earlier, would suggest that secular Sunday legislation of the provinces could live concurrently with the federal *Lord's Day Act*. But there is an additional feature to the theory of concurrency as applied to existing Sunday laws in Canada. Given the present federal *Lord's Day Act*, the theory is not only *implied* by virtue of the existence of both provincial and federal "gates of entry" discussed earlier, but is *explicit* in the operative provisions of the federal Act. It will be recalled that the federal prohibitions in sections 4, 6 and 7 were all qualified by the condition "except as provided . . . in any provincial Act or law now or hereafter in force". The conditional words are "except as *provided* . . .", not "except as *permitted* . . ." The word "provided" surely contemplates either prohibitive or permissive legislation. If a province is legislating for a religious purpose, then, as noted earlier in this chapter, it is confined to granting permissive exceptions from the federal religious prohibitions, otherwise its legislation would be criminal law and hence *ultra vires*. But if a province is legislating for a purely secular purpose, as we have proposed, then it is our view that given the independent provincial "gates of entry", the word "provided" followed by the exception clause conclusively clears the way for a province to proceed, *on the basis of its own powers in section 92*, with a plenary scheme for a secular Sunday.

When the exception clause was first accepted into the federal Act in 1906 by the Honourable Mr. Aylesworth prior to its enactment, he had this to say in the House of Commons:

It is certainly within the jurisdiction of the provincial legislature to legislate on all questions relating to property and civil rights, and as long as they do not encroach upon the domain of criminal law I can see no reason why they should not legislate validly as to Sunday observance.⁵²

⁴⁷ [1963] S.C.R. 643, at p. 650.

⁴⁸ See also *Mann v. The Queen*, [1966] S.C.R. 238; *Reference re Section 92(4) of The Vehicles Act*, (Sask.), [1958] S.C.R. 608; *Provincial Secretary of P.E.I. v. Egan and Attorney-General of P.E.I.*, [1941] S.C.R. 396; and *R. v. Yolles*, [1959] O.R. 206 (C.A.).

⁴⁹ *R. v. Chief* (1964), 42 D.L.R. (2d) 712 (Man.).

⁵⁰ *R. v. Snyder and Fletcher* (1967), 61 W.W.R. 112 (Alta.).

⁵¹ *Smith v. The Queen*, [1960] S.C.R. 776.

⁵² 77 H.C. Deb. (Can.) at col. 6272.

Later, Aylesworth commented:

It is a recognition of what I think very properly may be, and ought to be—a recognition of the coordinate rights, within their own jurisdiction, of the provincial legislatures to legislate upon this subject.⁵³

We do not maintain, however, that a province for secular purposes could regulate *all* Sunday activity in the province. It would probably be restricted to those industries, businesses or other establishments (or employments therein) over which it had jurisdiction. We have doubts whether a province could regulate, even as a secular matter, the Sunday operations of such federal enterprises as banks, interprovincial railways, airlines or interprovincial trucking lines. But even here, general provincial secular Sunday legislation might apply to them in the absence of any general or special federal legislation. General provincial tort and property laws have been held applicable in these terms.⁵⁴

In any event, the great majority of industries, businesses or other establishments, and employments therein, are provincially regulated as to labour conditions and hours of operation, and provincial secular Sunday legislation, if properly framed, could achieve the objectives of preserving a social environment for leisure and protecting labour which we have proposed earlier. And of course, the attainment of these objectives under a secular Sunday scheme could utilize to the fullest section 92(15) of the *British North America Act*, providing as it does for “the Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this section.”

Provincial legislation of this type would probably not conflict with the operative provisions of the federal *Lord's Day Act* as a practical matter. More likely, it would supplement it, but in a different way with a secular focus, prohibiting or regulating some activities which are already prohibited by the federal Act, or permitting or indeed promoting (again in a different way with a secular focus) other activities which are prohibited (for religious reasons) in the federal Act. It is possible that there could be a conflict where, for example, a province might wish to permit or promote some activity which the federal Act prohibits, or conversely, where a province wishes to prohibit or regulate some activity which the federal Act lists as permissible as a work of “necessity or mercy”. Under the normal application of the theory of concurrency, the conflict would have to be resolved in favour of the federal Act and the criminal law power. But with the clause “except as *provided* . . . in any provincial Act or law now or hereafter in force”, the federal paramountcy in the event of conflict may well have been waived. Certainly this is the case with provincial legislative regulation or permission of activities prohibited by the federal Act in sections 4, 6 and 7. It is not quite so clear whether provincial prohibitions could stand in the face of federal permission for “works of necessity or mercy”, particularly since the exception clause reads in full: “except as provided

⁵³77 H.C. Deb. (Can.) at col. 6563.

⁵⁴See *Attorney-General for Canada v. C.P.R. and C.N.R.*, 1958 S.C.R. 285.

herein, or in any provincial Act or law now or hereafter in force", the "herein" being an obvious reference to the list of works of necessity or mercy in section 11. Thus, it would probably not be valid for a province to prohibit a doctor from performing medical duties on Sunday in the face of section 11(b) of the federal Act which includes as a work of necessity or mercy "work for the relief of sickness and suffering". But a province, for valid secular reasons, might wish to regulate (with restrictions) certain forms of retail selling such as drug stores, whose owners might claim that their operations were works of necessity or mercy under section 11(b) of the federal Act "work for the relief of sickness and suffering, including the sale of drugs, medicines and surgical appliances *by retail*" [emphasis added]. While the province constitutionally might have some difficulty banning drug stores on Sunday, it probably could impose a rotational system, or strictly limit the types of products sold to drugs, medicines and surgical appliances, or restrict drug stores to certain geographical areas on Sundays, if any of these were considered desirable as a secular matter.

It is difficult to speculate in the abstract as to conflicting situations between federal and provincial Sunday legislation. Suffice it to say here that the likelihood of conflict is not great, and that in any event, the Courts are equipped to sort out these matters in the cases which arise, without striking down the whole of a secular provincial scheme. It may well be that a particular provincial regulation would have to give way to the federal Sunday jurisdiction in the event of a conflict in a specific area. But generally speaking, there is little danger that the whole of a *plenary* provincial scheme would fall if properly drawn on a secular basis as we have proposed.

We stated an opinion earlier that a province could legislate a plenary secular scheme respecting Sundays containing both prohibitive and permissive provisions, as long as it was carefully drawn to achieve secular and not religious objectives. It follows that even in the absence of the phrase "except as provided . . . in any provincial Act or law now or hereafter in force . . ." in the federal *Lord's Day Act*, such plenary secular legislation in a province could be sustained as long as it was not in direct conflict with the federal Act. However, the federal exception clause, using as it does the plenary word "provided", and not "permitted", does provide additional support for our concurrency position, and well might be tantamount to a waiver of federal paramountcy in the event of conflict in those areas which it covers.

As noted earlier, there are probably certain federal industries, businesses and employments such as banks, interprovincial transportation undertakings or the armed forces which provincial secular Sunday legislation could not cover. Hence, if it were considered desirable to render the secular Sunday of the type we have proposed more complete, complementary federal legislation on the same secular plan would probably be needed, covering such industries, businesses and employments. But the province need not wait for this complementary legislation, as it could substantially achieve the secular objectives proposed on its own, specifically or inferentially excluding the federal industries, businesses and employments in the provincial legislation.

D. THE FORM OF THE ORIGINAL PROVINCIAL LEGISLATION

Great care should be taken in selecting the form of provincial Sunday legislation for secular purposes. We have already commented as to the *title*. In the remaining chapters, we will provide proposals and alternatives which might be suitable for the operative provisions of such legislation. Here, we would propose that any provincial legislation which adopts our objectives outlined earlier in this chapter contain a section *at the beginning* (and not just a preamble), clearly setting forth these objectives for all to see. Not only would they provide a definite indication to the public as to what was actually being done in the legislation, but they would provide the Courts with a valuable aid to interpretation should the Act be constitutionally challenged. Of course, the Courts will still determine constitutional validity not by the statement of objectives or policies alone, but by the actual words of the operative provisions throughout the Act and the extent to which they conflict with existing federal legislation. Yet in areas such as Sunday laws, the practice of including a legislative statement of objectives or policies can be useful to the Courts. The practice has been adopted recently in two important federal Acts: the *National Transportation Act*⁵⁵ of 1967 and the *Broadcasting Act*⁵⁶ of 1968.

Mention should also be made of the desirability, from a constitutional point of view, of bringing all provincial Sunday laws into one legislative framework. This could be done by cross-referencing statutes, such as with *The Pawnbrokers' Act* or *The Game and Fish Act* or *The Judicature Act*, or by incorporating an entire existing statute into the new provincial Sunday statute such as might be done with *The One Day's Rest in Seven Act*. Even more helpful in establishing the secularity of a provincial Sunday scheme would be to tie in with the plenary Sunday legislation all the "hours of work and business" provisions found in *The Employment Standards Act* or authorized under *The Municipal Act* and *The Industrial Standards Act*, pertaining to statutory holidays and early closing hours on weekdays. Our point here is that if the province considers it desirable to regulate industries, businesses and employments, etc., on holidays, evenings and Sundays for basically the same secular objectives, then we would propose their integration with Sunday laws, not only to ensure the constitutional validity by clearly marking the scheme as secular, but as a matter of sound legislative policy.

E. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The Legislature of Ontario has the constitutional jurisdiction to enact a plenary scheme of Sunday laws respecting provincial fields of activity as long as the legislation is carefully drawn to achieve secular and not religious purposes.

2. This secular plenary scheme of provincial Sunday laws can take either a prohibitive or a permissive form, and can be enforced by means of fines or other penalties.

⁵⁵S.C. 1966-67, c. 69, s. 1.

⁵⁶S.C. 1967-68, c. 25, s. 2.

3. If the Legislature of Ontario wishes to enact a scheme of Sunday laws to achieve religious purposes (which we would not propose), then such legislation can only be permissive in form (but with limits to the permission), operating as exceptions from the general prohibitions in sections 4, 6 and 7 of the federal *Lord's Day Act*. Any prohibitive Sunday provisions for religious purposes must be made by the Parliament of Canada.

4. If a secular plenary scheme of Sunday laws is to be enacted by the Legislature of Ontario, as we have proposed, it should contain provisions at the beginning clearly setting forth the secular purposes intended. Also, the legislation should incorporate all provincial laws respecting Sunday, either by direct inclusion or by cross-reference. Finally, it should be integrated or cross-referenced with "hours of work and business" provisions under *The Employment Standards Act*, *The Municipal Act* and *The Industrial Standards Act*.

CHAPTER 11

SUNDAY SELLING

S U M M A R Y

- A. GENERAL PROHIBITION WITH EXCEPTIONS FOR "ESSENTIAL" SALES
- B. METHODS OF REGULATING AND CONTAINING "ESSENTIAL" SALES ON SUNDAY
 - 1. Maximum Number of Employees
 - 2. Maximum Square Footage
 - 3. Product or Trade Designation
 - 4. Maximum Assessed Value of Premises or Inventory
 - 5. Hours Limitation
 - 6. Location Restriction based on Area and Population Density
 - 7. Rotational System
 - 8. Time of Year
 - 9. Type of Management
 - 10. Other Physical Limitations
 - 11. Licensing
- C. APPLICATION OF METHODS TO PARTICULAR CLASSES OF ESSENTIAL STORES AND ESTABLISHMENTS
 - 1. Gasoline Service Stations
 - 2. Drugstores
 - 3. Restaurants
 - 4. Variety, Convenience and Jug Milk Stores
 - 5. Tobacco Shops and Newsstands
 - 6. Confectionery and Candy Shops
 - 7. Nurseries
 - 8. Fresh Fruit and Vegetable Stands
 - 9. Souvenir and Novelty Shops
 - 10. Antique Markets
- D. THE COORDINATION AND INTEGRATION OF METHODS
- E. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL PROHIBITION WITH EXCEPTIONS FOR "ESSENTIAL" SALES

In attempting to achieve, as a secular matter, the two purposes which we have proposed in Chapter 9, we were constrained to look first at Sunday selling as the most obvious area requiring regulation. Sunday sales are now prohibited by section 4 of the federal *Lord's Day Act*. However, through a combination of claims that they are "works of necessity and mercy" under section 11 and the policy of the provincial Attorney General as to granting consent to prosecute

under section 16 of that Act, certain types of retail establishments have been staying open in Ontario. Others have knowingly, or unknowingly, defied the law by staying open.

We have already noted the extent to which the prohibitions in the federal Act, including section 4 pertaining to Sunday sales, are primarily directed towards a religious purpose — to prevent the profanation of the Lord's day. Also, we made reference in Chapter 6 to the lack of present relevance of several items in the list of "works of necessity or mercy" in section 11 of the federal Act, and the apparent dissatisfaction of many members of the public with the prosecutory discretion granted in section 16 and the selective enforcement which it permits. We will be commenting further on section 16 in Chapter 17.

Here, we would propose that Ontario enact legislation, as part of its plenary secular scheme of Sunday regulation, prohibiting all Sunday selling except for certain clearly defined exceptions which we will discuss below. We consider this to be preferable to a continued reliance on section 4 of the federal Act, not only as a means of providing a secular alternative to many of the religious inferences present in that Act but as part of a "clean slate" approach in this province to a major problem demanding a high degree of sophistication in modern legislative technique.

Why should Ontario attempt to prohibit retail selling on Sunday? We might have been tempted here to rely merely on public opinion expressed in the briefs, at the public hearings and in the attitudinal and behavioural research results outlined in Chapters 6 and 7, and to say simply "the public doesn't want it". However, we feel an obligation to articulate, briefly, the substantive reasons for our proposal.

First, the retailing and wholesaling sector of the economy in Ontario is a large employer of people. We noted in Chapter 5 that in 1969, 16.1% (472,000 people) of the Ontario labour force were engaged in some aspect of the wholesale or retail industry and that 6.9% (202,000 people) of the labour force were engaged directly in sales, by occupation. By curtailing Sunday selling in the province, most of these people will be assured of freedom from work on Sundays to engage in leisure activities of their own choosing with their family and friends.

But it might be asked why is a *law* necessary to provide a Sunday pause day for these employees when most retail establishments will close Sundays anyway as a matter of custom and practice; in any event, the argument goes, why should an employee who *wants* to work Sunday be prohibited from so doing and from negotiating a satisfactory financial arrangement with his employer? Drawing again on our economic analysis in Chapter 5, we are of the opinion that without a law regulating Sunday openings, competition in the highly sensitive retailing industry will ultimately force many retailers, particularly the food stores (discount or otherwise) and discount department stores, to open, and those that do not will suffer an economic disadvantage. Also, we have doubts whether in the absence of Sunday

regulation retail employees are in an economic position to negotiate a satisfactory financial arrangement for Sunday work. Less than 10% of retail employees are members of unions and generally their negotiating position is not strong. Retailing employees tend to be more heterogeneous than other groups: many are married, with a high proportion of women whose income is auxiliary to the husband's earnings; they have a low job mobility and historically have had difficulties expressing themselves to redress their grievances. Almost half (47.4%) of the retail sales employees in the province work in stores employing 20 or more persons, and these stores, though few in number (3.2%) account for 39.4% of retail sales in the province; only 12% work in stores employing 3 or fewer persons.¹ This all points to our major concern that most retail employees, in the absence of Sunday regulation, would not really have much freedom of choice whether they wanted to work or not. In many cases, they would be subject to subtle economic pressure to work, particularly in large establishments where employee resistance to management decisions to open would be met simply by replacing the resisting employees. This is not a criticism of large economic aggregates in retailing, but an acknowledgment of the potential power which they wield on this matter.

Another reason for curtailing Sunday selling, which is in some respects derivative from potential demands of retail employers discussed above, is that an open commercial Sunday would result in a significant increase in the price of retail goods, particularly food. After averaging across several classes of retail stores, our economic researcher estimated this price increase to be in the range 0.5–1.5% if every store in a class were to open on Sunday afternoons. This estimate was based on total week's sales, profit levels and efficiencies remaining the same as present (a full analysis of this estimate is set forth in Chapter 5). In our opinion, based on evidence placed before us, the range of price increase would be substantially higher than 0.5–1.5% in certain classes of retail stores. While fixed costs (e.g., heat, rent, etc.) would remain the same with Sunday openings, variable costs (e.g., labour, promotion and advertising) would increase for the week. The greatest increase in variable costs would be for labour, which in some instances would involve payment of premium rates. Most retail managers who submitted briefs or appeared at the public hearings confirmed our findings concerning a price increase. In food retailing, with 80% of employees organized by unions and with a high frequency of premium rates (generally double time) and fixed full-time/part-time employee ratios, the price increase would probably exceed the 0.5–1.5% range.

The third reason for curtailing Sunday selling relates not so much to the proposed objective of protecting labour but to the objective of preserving a "quality environment" on Sundays for leisure activities among family and friends. The term "quality environment" of course implies certain value judgments concerning the nature of the day. But we believe that it is one of the roles of government to make judgments concerning the physical and social environment, to reflect

¹See Chapter 5, Table V appearing at footnote 6.

the preferences of the majority of the population. With selling, there are certain conditions or activities which, although necessary and acceptable on other days of the week, might not be conducive to the type of social environment most people would prefer for their Sunday leisure. Neon lights, loudspeakers, telephone solicitations, hard-sell media advertising, and heavy truck traffic are but examples of what people generally refer to as "commercialization". Historically, selling has been the basis of commercialization; indeed, it is at the core of our entire economic system. Yet, today, as in the past, the majority of people regards commercialization on Sunday, or indeed on other holidays, as inconsistent with the type of leisure which they wish to pursue with their family and friends. This is not to imply that the vast majority of people wishes to stay home and rest in peace and solitude on Sunday. It means simply that they do not wish to have their Sunday environment filled with the type of commercial distractions and disruptions which will make their leisure activities — whether sports, going for a drive, watching television, or visiting friends — any less enjoyable.

We would not deny that some types of Sunday selling might result in a form of leisure activity for Sunday shoppers. This is often referred to as the "pleasure component" in shopping. And we were told by our economic researcher of the trend in shopping centre developments to build in recreational facilities such as theatres and bowling alleys, as complementary to the shopping facilities. Also our behavioural researchers noted that many persons who now shop in supermarkets open on Sundays tend to treat it as a family outing. Yet, a "pleasure component" in shopping is the type of Sunday leisure which must be carefully weighed against the deprivation of Sunday leisure for all those employees who are required to work that day to provide the shopping facilities. Because of the high labour content involved in Sunday selling, we have no hesitation in opting for the protection of the employees in this area — admittedly at the expense of those who would derive pleasure from Sunday shopping. This balancing of competing social claims is surely one of the principal roles of law makers, and is particularly necessary in the general area of work and leisure. With Sunday shopping we believe the case against is clear.

It is, of course, impossible and indeed undesirable to stop *all* commerce on Sundays. There are countervailing considerations related to public demand for "essential" items. And to a limited extent, a few persons might have to forfeit part of their Sunday leisure (with compensation through premium rates or time off on other days of the week) to satisfy the majority demand for these "essential" items. Yet it is our view that the general principle of preserving a "quality" Sunday environment "free from work for the pursuit of leisure activities among friends and family" should be maintained as far as possible and that this is directly dependent on a general prohibition against Sunday selling.

What is the "essential" Sunday selling which should be permitted as exceptions to the general prohibition? Section 11 of the federal *Lord's Day Act* permits "works of necessity or mercy", and without

restricting the ordinary meaning of that expression, lists twenty-four classes of work to be included. The inappropriateness of many of the items in this list to modern conditions and the ambiguity of the term "necessity" (without further policy guidelines) has made section 11 a difficult one for the Courts to interpret, as was noted in Chapter 8. Many of the judicial decisions, in the interests of reaching an equitable result, have given interpretations to some of the illustrative heads stretching their literal meaning beyond recognition.

Therefore, we feel an obligation here to specify clearly what we mean by "essential" Sunday selling. This entails going further than the mere listing of those types of stores or establishments which should be allowed to open Sundays as an exception to the general rule. Rather, we consider it necessary to provide what might be termed "determinants of essentiality", capable of broad application to all aspects of retail selling, as rational guidelines against which demands for the Sunday operation of specific classes of stores and establishments can be easily assessed. The determinants of essentiality which we would propose here are useful for assessing demands for Sunday services, manufacturing and production as well, as will be discussed in subsequent chapters. They are as follows:

- (1) humanitarian
- (2) emergency
- (3) perishability
- (4) seasonal
- (5) recreational
- (6) familial
- (7) convenience
- (8) technical.

The *humanitarian* determinant relates to maintenance of health and is perhaps the most obvious; the Sunday sale of drugs and medicines is an example of "essential" sales which would be permitted by the application of this determinant. The *emergency* determinant implies protection of both persons and property against unforeseen events, such as the sale of fuses, light bulbs or fuel oil. *Perishability* is a determinant which has been applied historically to sale of such food items as milk and bread. The *seasonal* determinant would apply only to those items available for sale for a short period each year such as fresh domestic fruit or nursery stock. The Sunday sale of certain items such as antiques, souvenirs or newspapers might also be considered "essential" because of the high *recreational* content involved, using that term in the broadest sense. The *familial* determinant relates to commercial activities which usually require family participation and decision, such as inspecting a house or cottage with a view to purchase. *Convenience* is a determinant more difficult to define than some of the others, but generally relates to the widespread demand for those consumable items used on a daily basis and without which consumers would be considerably inconvenienced if denied daily access to them. Examples here are many,

but one might consider tobacco products, soft drinks or other confectionery items. Finally, the *technical* determinant relates to sales without which a desired Sunday activity could not take place; an example is the sale of gasoline — without which recreational driving and boating would be greatly impeded.

These eight determinants of essentiality we believe to be useful as legislative policy guidelines in formulating a list of specific exceptions to appear in provincial Sunday legislation. Their primary purpose is to avoid much of the ambiguity and inconsistency which has surrounded the exceptions in the federal *Lord's Day Act* and at the same time to provide a secular framework for viable Sunday legislation capable of accommodating today's and tomorrow's social and economic problems.

B. METHODS OF REGULATING AND CONTAINING "ESSENTIAL" SALES ON SUNDAY

In applying these determinants of essentiality to specify certain classes of stores or business establishments which should be exempted from the general prohibition, it becomes necessary not only to name the classes of stores or establishments to be exempted, but, more important, to develop viable methods of regulation and containment to ensure that their "essentiality" does not become a guise for engaging in non-essential Sunday selling.

Therefore in this section we will examine *first* the available methods of regulation and containment of essential Sunday selling. Then we will propose a specific list of classes of stores or business establishments which might be exempted from the general prohibition on the basis of the determinants of essentiality discussed above, and will suggest specific methods of regulation and containment which we consider best suited to each class.

Before doing that, however, we would make it clear why we consider it necessary to have methods of regulation and containment of essential Sunday selling at all, apart from naming the specific classes of stores or establishments. First and foremost, the methods are aimed at meeting our two basic objectives of (1) preserving a quality (non-commercial) environment for Sunday leisure, and (2) protecting labour. But they go further than this. Through the device of "scrambled merchandising" (discussed in Chapter 5) some classes of "essential" stores and establishments have been extending the scope and breadth of their Sunday operations into non-essential selling to such an extent that they are making a significant competitive impact on classes of stores required by law to remain closed. This Sunday advantage for the sale of non-essential items is creating an inequitable situation which might lead to widespread demands for equal treatment by those stores legally required to close. Indeed, some of these stores have already responded to the inequitable situation by opening Sundays in open defiance of the law, but ostensibly out of economic self-defence.

This means that the methods of regulation and containment for essential Sunday selling proposed below are designed not only to limit Sunday employment in essential stores and establishments and to preserve a quality environment for leisure, but to reconcile the public demand for "essential" selling on Sunday with the notion of equal treatment for all stores and establishments engaged in selling generally, regardless of their designation or form. We would not propose the elimination or undue restriction of Sunday operations of classes of stores or establishments which truly serve an "essential" function according to one or more of our determinants. But neither would we countenance the development of a situation in which "essentiality" becomes a camouflage for non-essential Sunday selling in a manner which eventually triggers a widespread movement toward an open commercial Sunday in this province.

The methods of regulation and containment which follow are probably exhaustive of the possibilities which could be applied to "essential" Sunday selling. Some are more suitable and effective than others, and some are clearly inappropriate or unnecessary for certain classes of essential selling. However, we consider it useful to set forth here a complete inventory of methods.

1. *Maximum Number of Employees*

This is a standard relatively easy to enforce, and which is directly related to the objective of preserving Sunday as a day free from work. The *Commercial Establishments Business Hours Act*² in Quebec pertaining to statutory holidays and evening hours adopts a maximum of three persons for the entire day (including employers and employees) in establishments exempted from the closing restrictions in the Act. The *Lord's Day Act*³ in New Brunswick provides an exemption for stores and canteens "wherein normally no more than three persons, including the owner or proprietor are employed in the usual conduct of business", and which have obtained a permit issued by the Minister of Justice, on the advice of a Board.

2. *Maximum Square Footage*

This standard also is relatively easy to enforce. It could be applied to sales area only, or both stock and sales area. We would strongly recommend the latter, otherwise the purpose of the standard could be circumvented by excessively large stock areas used to feed non-essential selling through high-frequency stocking arrangements.

3. *Product or Trade Designation*

The policing of a product designation standard is relatively easy, while trade designation is slightly more difficult as the cases attempting to interpret some of the heads under section 11 of the federal *Lord's Day Act* have illustrated. But if a product designation standard were to be adopted for a particular class of stores or establishments, it would be extremely difficult to name exactly

²1969, S.Q., c. 60, s. 5.

³S.N.B. 1967, c. 16, s. 2(1)(m).

what products should be included, and to come up with a list which was not going to have to be amended at frequent intervals. For example, if it were decided that drugstores were "essential" on Sundays and that a product designation standard should be adopted, what products should be named? Certainly, one could include drugs, medicines and other items for the relief of pain and sickness, but would such items as stationery or toothpaste or films (all of which are usually sold in drugstores) also be named? Perhaps merely the trade designation "drugstores" would be a sufficient standard here, but what about those drugstores who might choose to sell such items as hardware or sporting goods? *The Municipal Act*⁴ in Ontario deals with this problem for municipal early and holiday closing bylaws in the following section:

379a(1a) Where two or more classes of trades are carried on in a shop and at least 70 per cent of the total gross sales of the shop is derived from one trade, such trade is the principal trade carried on in the shop, and the class of such shop shall be determined in relation to such principal trade.

379a(1b) Where it is alleged that any person has contravened in any month any provision of a by-law passed under this section, the total gross sales of the shop for the purpose of determining the principal trade, if any, carried on therein is the total dollar volume of gross sales of goods and services made, whether for cash or credit or part cash and part credit, by any person in the whole of the shop in the preceding twelve months, and, if the shop has been in operation for less than twelve months, is the total dollar volume of gross sales of goods and services made, whether for cash or credit or part cash and part credit, by any person in the whole of the shop in the preceding month or months in which the shop was operated.

Thus if more than 30% of a store's gross sales (by dollar volume) over a one-year period were non-drug items, then it would lose its designation as a drugstore and any privileges which that would provide under municipal bylaws enacted.

As a practical matter, we tend to favour trade designation as opposed to product designation because of the inherent difficulties in coming up with a specific list of products that will satisfy most consumers' notions of what is "essential". Trade designation allows for more flexibility to meet changes in consumer needs. Yet this requires quantification as to *principal* trade such as exists in *The Municipal Act* to avoid the problems of "scrambled merchandising" referred to earlier.

In Manitoba, *The Shops Regulation Act*⁵ contemplates the possibility of "scrambled merchandising" by pharmaceutical chemists,

⁴R.S.O. 1960, c. 249. In particular, see section 379a as enacted by S.O. 1961-62, c. 86, s. 43; amended by S.O. 1964, c. 68, s. 10; further amended by S.O. 1965, c. 77, s. 28(1); and further amended by S.O. 1966, c. 93, s. 24.

⁵R.S.M. 1954, c. 242, s. 15.

chemists or druggists who are exempted from municipal closing by-laws for the sale of drugs, medical appliances or goods usually sold by these persons, with the following wording:

... but if it appears to any council at any time that the druggists are taking advantage of this section to sell, after the prescribed hour for closing, any line of goods that is, in the opinion of the council, not properly within the class of goods usually sold by druggists, the council may pass a by-law specifically stating that any particular line or class of goods shall not be sold in any drug shop after the prescribed hour for closing; and the by-law may then be enforced and any infraction thereof punished notwithstanding anything in this section.

Section 379a(9) of *The Municipal Act* in Ontario merely exempts pharmaceutical chemists or druggists from any penalty under any closing bylaw for "supplying medicines, drugs or medical appliances after the hour appointed . . . for closing".

4. *Maximum Assessed Value of Premises or Inventory*

As applied to premises, this is a relatively simple standard to police and enforce. Its effectiveness would be dependent on the system of realty assessment used, and whether it was uniform throughout the province or varied from municipality to municipality.

The City of Halifax, in granting Sunday permits to grocery stores, confectionery stores, souvenir and novelty shops, and canteens and fruit stands under the authority of the *Lord's Day (Nova Scotia) Act*,⁶ uses the standard of a \$9,500 maximum business occupancy assessment as set out in the assessment rolls of the city. Business occupancy assessment in Halifax is based on one-half the value of the premises occupied for business purposes. Therefore no permit will be granted to such a store, canteen or fruit stand with premises worth more than \$19,000.⁷

The *Municipal Act*⁸ in Nova Scotia also contains a provision authorizing local shop closing bylaws on any day or part of a day but with power to exempt any retail stores or establishments "the personal property in which, regardless of ownership, is assessed at three thousand dollars or less". Assessment of inventory would be a more difficult method of regulation and containment than assessment of premises (i.e., realty) because of the elaborate system of surveillance and reporting that would be required, and the opportunities for evasion.

5. *Hours Limitation*

Traditionally this has been a frequently used standard in regulating or containing various stores and other establishments under municipal early closing and holiday bylaws. It is used in both

⁶R.S.N.S. 1967, c. 172, s. 3.

⁷See Ordinance No. 109, section 3(2) of the City of Halifax. A further explanation of this ordinance was provided by Donald F. Murphy, Halifax City Solicitor in a letter dated September 14, 1970.

⁸R.S.N.S. 1967, c. 192, s. 191(90).

New Brunswick and Nova Scotia as one of the criteria applied under the licensing or permit systems respecting Sunday operations of certain establishments there. And it is used for all activities covered by *The Lord's Day (Ontario) Act* in that they are not permitted to start until after 1.30 p.m.

The use of this standard would not necessarily mean the designation of specific *times* for opening and closing. Indeed, it might be advisable to avoid naming times in order to remove any religious inferences that could be drawn from, say, a 1.30 p.m. opening hour (which might be regarded by some persons as a device to protect church attendance). Rather, we would prefer that such a standard be expressed in terms of consecutive number of hours, and let the manager of each essential store or establishment determine for himself at which times he would choose to use up his allotted hours. This would probably result, however, in different opening times for different stores or establishments even within a class, and would entail extensive reporting and surveillance for effective enforcement.

6. *Location Restriction based on Area and Population Density*

This standard would be a form of zoning of essential stores and other establishments for Sunday operations. It could operate in its simplest form by limiting certain classes of stores or establishments to specific geographical areas in each municipality. A more sophisticated and desirable form would be to relate the essential items provided by a class of store or establishment to the needs of consumers in a given area, taking into account numbers, densities and life styles, and to permit essential stores and establishments to operate in these areas only to the extent that the actual need warranted. This type of standard, however, would require elaborate municipal or provincial licensing machinery to determine consumer needs in each given area, and to allocate licences to applicants desiring to fill the need.

The simpler type of geographical restriction for early closing and/or holiday closing municipal bylaws is now permitted under section 379a(6) of *The Municipal Act*:

The council of every township has, with respect to *any part* of the township designated in the by-law, all the rights and powers conferred by this section on the council of a city, town or village and may pass by-laws that apply *only to the part of the township so designated*. [emphasis added]

Similarly, section 379b relating to closing bylaws for retail gasoline outlets states that "the by-law shall apply only in the part or parts of the municipality designated in the by-law".

7. *Rotational System*

A rotational system may be enforced by law in either of two ways: the law may restrict on Sundays merely the number of essential stores or establishments within a class for particular trading areas (determined by geographic location and/or population

density) and let all those stores or establishments within that class work out for themselves (generally through an association) who is to open and on what Sundays. Or if this degree of voluntary cooperation is not possible, the law could prohibit all stores or establishments within a class from opening Sundays and then authorize the issuance of "excepting" licences (by the municipalities or a provincial authority) to particular stores or establishments each Sunday on a numerical rotational basis which may or may not be related to geographical area and population density, but having as a general standard the servicing of the minimum essential needs of consumers in the area. In the latter case, there should be a requirement of consultation by the licensing body with all stores or establishments in a class before granting excepting licences in their trading area.

We are not aware of any Ontario precedents for the first type of rotational system, required as a matter of law, although many voluntary systems exist particularly among drugstores. The second type of rotational system has been legally adopted by bylaw in many municipalities for retail gasoline outlets under the authority of *The Municipal Act*,⁹ and before 1962 under *The Factory, Shop and Office Building Act*.¹⁰ Under this latter Act, it was possible until 1962 for 75% or more of service station operators in a municipality to compel the municipal council to pass a bylaw providing, *inter alia*, for Sunday closing with permitted exceptions in the nature of a rotational system.¹¹

8. *Time of Year*

This type of standard recognizes that there are seasonal variations for "essential" Sunday selling. It is perhaps most appropriate for application in tourist areas (to be discussed in Chapter 15), but it might have some utility in all parts of the province in respect of that type of selling deemed "essential" by application of the seasonal determinant discussed earlier. The three subsections of section 379a of *The Municipal Act* which authorize bylaws for early closing, afternoon closing one day a week, and complete closing one day a week, respectively, each contain the words "during the whole or any part or parts of the year . . .", meaning that these three types of closing bylaws can be given seasonal application for specific classes of shops if considered desirable. Section 379b relating to bylaws for retail gasoline outlets has the same clause.

9. *Type of Management*

It would be possible to permit only those essential stores and establishments which are owner-operated to open on Sunday. This type of standard would be consistent with one of our objectives of protecting retail employees from being economically coerced into working Sunday since it would guarantee that at least *one* of the persons working on Sundays was the very owner who decided to open, and might have an ameliorating effect in that regard.

⁹ *Supra*, note 4, s. 379b.

¹⁰ R.S.O. 1960, c. 130, s. 79. This section was repealed and replaced by *The Municipal Amendment Act, 1961-62*, c. 86, ss. 43, 57.

¹¹ R.S.O. 1960, c. 130, s. 78(4).

However, it would have the disadvantage of increasing prices in essential stores and establishments because many of the economies of volume buying and chain merchandising would not be available to the independent entrepreneur.

The *Commercial Establishments Business Hours Act* in Quebec, which applies only to evening and holiday closing hours, does *not* include among the exemptions for "essential" selling any businesses which "form part of a great number of commercial establishments joined together to form an association". The word "association" is not defined in the legislation, but in our opinion would appear to embrace corporate chains or franchised operations trading under the same name.

10. *Other Physical Limitations*

There are certain facilities crucial to specific types of essential Sunday selling which might be limited as an effective method of regulation and containment. It is impossible to generalize for all classes of essential stores and establishments, but the following are some examples: (1) for retail gasoline outlets, restrict the number of pumps; (2) for variety, convenience and jug milk stores, restrict the number of cash registers and check-out areas or the cubic footage of refrigeration space. As well, limitations for many types of essential selling might be achieved through regulation of parking lot size, street frontage, number of entrances, square footage of display shelves and related items.

11. *Licensing*

This could be attempted on a province-wide or a municipal basis, and would permit the application of any or a combination of the above methods for regulating and containing essential Sunday selling. The licensing body might be an independent tribunal or board at the provincial or municipal level, a designated governmental official such as the Chief of Police in each municipality (which is the case in some U.S. jurisdictions), the municipal council (which is the case in Nova Scotia under the *Lord's Day (Nova Scotia) Act*¹²), or the Attorney General and Minister of Justice (which is the case under the *Lord's Day Act*¹³ in New Brunswick where the Minister of Justice issues, cancels or suspends Sunday permits on the advice and recommendation of a Board¹⁴ which is also empowered to recommend conditions pertaining to the issuance of permits).

The main advantages of a licensing system are flexibility and ease of enforceability. Any number of the above standards may be applied to a class of "essential" stores in a manner best suited for that particular class of operation. And those that fail to adhere to the standards in their licence for that class of store or establishment are then subject to having it suspended or revoked, depending on the circumstances. Prosecutions are brought only for operating without a licence, not for violating a standard. The disadvantages of a licensing

¹² R.S.N.S. 1967, c. 172, s. 3.

¹³ S.N.B. 1967, c. 16, ss. 3, 6.

¹⁴ *Ibid.*, ss. 4, 5.

system are that it requires fairly elaborate and expensive administrative machinery for prescribing and applying standards, receiving applications for and issuing the licences, inspection and investigation of licence holders, and for notice, hearings, right to counsel, rights of appeal, judicial review and related procedures respecting renewals, suspensions or revocations. The first of these disadvantages can be overcome by prescribing specific standards for each class of essential selling in the legislation itself for the benefit and direction of the licensing body.¹⁵

Apart from New Brunswick and Nova Scotia, none of the other provinces uses a licensing system for essential retail selling, although licences are required in several of the provinces for Sunday operations of certain recreational activities such as billiard rooms and bowling alleys. In England, there are licensing provisions under the *Shops Act, 1950* for the sale of bread, fish and groceries before 10 a.m. (by an exemption order of a local authority), for resort areas, for sabbatarian exemptions, and for airports (at the discretion of the Minister of Aviation). In the U.S.A., a number of states authorize local authorities to license essential Sunday selling although the standards and degree of specificity vary greatly from state to state. In Australia and New Zealand, licensing would appear to be a widely used control technique for recreational and entertainment facilities but not for Sunday selling except for the state of Victoria under the *Labour and Industry Act, 1958* which licenses Sunday operations of retail gasoline outlets. In New Zealand the *Shops and Offices Act, 1955* provides for exemptions from its general shop closing law by means of awards of the Court of Arbitration, which has a wide discretion to specify types of shops and the hours they may be open Sundays. Also, the same Act makes provision for a Shops and Exemptions Tribunal which has an elaborate procedure for entertaining applications for exemptions from shop closing laws or from awards of the Court of Arbitration imposing closings or openings.

C. APPLICATION OF METHODS TO PARTICULAR CLASSES OF ESSENTIAL STORES AND ESTABLISHMENTS

The following classes of stores and business establishments are, in our view, "essential" and should be permitted to open on Sundays subject to regulation and containment:

1. gasoline service stations
2. drugstores
3. restaurants
4. variety, convenience and jug milk stores
5. tobacco shops and newsstands
6. confectionery and candy shops
7. nurseries
8. fresh fruit and vegetable stands
9. souvenir and novelty shops
10. antique markets.

¹⁵See Royal Commission Inquiry into Civil Rights (Hon. J. C. McRuer, Commissioner), Report No. 1, Volume 3 (1968), pp. 1100-1107.

Our reasons for selecting these classes are based on an application of the determinants of essentiality discussed earlier. While we think this list encompasses *all* the classes of stores or establishments for which there is widespread public demand on Sundays (keeping in mind the overall objectives of preserving a quality environment for Sunday leisure and protecting labour on that day), there may be other forms of Sunday selling which have not come to our attention and which might now or in the future be considered "essential" by an application of the various determinants. However, we would caution against any wholesale expansion of this list in the absence of strong evidence of need. Otherwise, the entire basis of the general prohibition of Sunday selling, and the objectives which it seeks to achieve, will eventually become eroded and permit the development of the same sort of inequities among retailers that have prevailed in recent years.

The following is a brief discussion as to the essentiality of each class of store or business establishment and the methods of regulation and containment which we would propose.

1. *Gasoline Service Stations*

Without these establishments, certain widespread recreational activities such as Sunday driving, boating and snowmobiling might be substantially curtailed. Also it would make travel to and from recreational areas very difficult, particularly where long distances are involved. Since it is one of our primary objectives to preserve, and indeed promote Sunday leisure activities, we view the retail sale of gasoline and associated products, and motor vehicle repairs, as essential from a *technical* point of view. Also, there is an emergency factor here where transportation by automobile or other vehicle is suddenly required for the protection of persons (e.g., serious sickness requiring immediate hospitalization) or of property (e.g., fire), particularly in the less populated parts of the province. The automobile is now very much a part of our way of life in Ontario and it would be unreasonable to expect all gasoline and related products to be purchased prior to Sunday when so much actual driving is done that day (often requiring more than one tank of gasoline).

However, we view with alarm the recent development of some gasoline retailers to engage in scrambled merchandising on Sundays by operating what are, in reality, general merchandise stores on that day. Except to the extent that the products are directly related to the automobile or other vehicles, this would appear to be an example of non-essential Sunday selling. We are also concerned as to the extent to which many of the landlord/oil companies of retail gasoline outlets are forcing their lessees to open Sundays against their will, which is a form of coerced Sunday work. Evidence of this practice was received from both the Garage Operators' Association of Ontario Inc. and the Ontario Retail Gasoline and Automotive Service Association.

Accordingly, we would propose the application of two methods of regulation and containment: a strict trade designation and a rotational

system. The former could be achieved simply by the words "the retail sale of gasoline and other products necessary for the physical operation of motor vehicles, and including essential motor vehicle repairs", accompanied by the requirement that 90% of the total business (by dollar volume of gross sales) be of the principal trade designated (similar to sections 379a(1a) and 379a(1b) of *The Municipal Act*).

An alternative trade designation might be that provided for the retail gasoline service industry in section 18(1) of *The Industrial Standards Act*:

In this section, "retail gasoline service industry" means the business of operating retail gasoline service stations, gasoline pumps or outlets where gasoline is offered for sale at retail, including washing, waxing, oiling or lubricating automotive vehicles, repairing or changing tires and other services and undertakings incidental thereto, but does not include a gasoline outlet on the premises of an employer and used in the fueling of automotive vehicles owned or operated by the employer.¹⁶

The rotational method can now be achieved on a local basis by municipal bylaws enacted under the authority of section 379b of *The Municipal Act*. However, there has been no uniform pattern across the province in this respect, resulting in inequitable situations particularly between adjoining municipalities where one has imposed a rotational system and the other has not.

Therefore, we would propose that a rotational system for gasoline service stations be adopted on a province-wide basis, with licences for Sunday operations being issued by an appropriate provincial licensing body which would divide the province into trading areas and distribute licences among those stations wishing to open in each trading area on an equitable rotating basis. The licensing body, before prescribing a rotational system in a given trading area, should be empowered to canvass the views of all service station operators in that area and to receive their individual or group submissions as to an appropriate rotational system, which may or may not be accepted depending on whether they meet the desired objectives of an effective rotational system. A suggested standard which the licensing body might be required to apply to ensure a minimum level of Sunday service is one licence for every village, town or city and sufficient licences thereafter to a maximum of 20% of normal weekday capacity, taking into account all service stations in the trading area under consideration. This 20% maximum might be reduced to 5% for Sunday hours other than the regular business hours of 9 a.m. to 6 p.m., to permit emergency 24 hour service, yet allow most stations participating in the rotational system to close at 6 p.m. on the Sundays when it is their turn to open.

The City of Toronto, through Early Closing Bylaw No. 21484, has incorporated similar standards which have been in operation since 1948. Under this bylaw, 20% of service stations are permitted

¹⁶R.S.O. 1960, c. 186.

to open in rotation on Sunday from 10 a.m. to 5 p.m. every fifth week and 5% are permitted to remain open 24 hours every day for one week at a time in rotation, with the general closing times otherwise set from 7 p.m. to 7 a.m. each weekday and all day Sunday. The Borough of Scarborough under Bylaw 8351 permits 25% of service stations to open on Sunday from 10 a.m. to 10 p.m. every fourth week. The City of Kingston under Bylaw 1998 permits 22% to open from 7 a.m. to 10 p.m. on Sunday, and 10% to be open on a 24 hour per day basis for emergency purposes. The City of Peterborough under Bylaw 5264 has a rotational system which permits up to one-third of the service stations to open from 5 p.m. to 9 p.m. for a seven consecutive day period.

We received no complaints from the general public about the Sunday service permitted under these types of bylaws. Certainly the service station operators themselves are happy with this type of regulation as demonstrated by a recent survey conducted by the Ontario Retail Gasoline and Automotive Service Association in which 72% of all operators in the city of Toronto replying to a mail questionnaire (204 replies were received from the approximately 400 stations in the city) stated that they were in favour of retaining and enforcing Bylaw No. 21484.

Variations from the 20% and 5% standards might be allowed by the licensing body by taking into account seasonal considerations and the extra traffic generated in specific trading areas at certain times of year. The need for such variations can be determined by canvassing the operators in each trading area and by assessing seasonal traffic density.

Failure to observe the stated trade designation on Sundays (with 10% allowable variance) should result in a possible suspension or revocation of a Sunday licence providing for participation in the rotational system described above.

We considered the possibility of limiting the maximum number of employees in a service station permitted to open Sundays under the rotational system, but rejected this method since it would impose an undue hardship on those few employees working in the stations at times of peak business and might cause considerable delay to members of the travelling public. In any event, a properly drawn and administered rotational system would make an employee limitation unnecessary.

Service centres established on controlled-access highways should not be subject to the above methods of regulation and containment, but should continue to be regulated by special agreement with the Minister of Highways, as under section 379d of *The Municipal Act*.

2. Drugstores

No one would deny the essentiality of a drugstore on Sunday for the sale of drugs, medicines or medical appliances. The difficulty is in regulating and containing those many items which a

drugstore usually sells and yet which cannot reasonably be said to fall within those terms. This is particularly true for those items which are also sold in other classes of stores or establishments which are required by law to remain closed on Sundays. And as noted previously, some drugstores have expanded their Sunday operations into such non-essential items as hardware, paint and sporting goods.

We would therefore propose that drugstores be regulated or contained on Sundays by a province-wide licensing body applying the following three methods: (1) a trade designation; (2) the requirement that a registered pharmaceutical chemist be on the premises during all Sunday hours; and (3) a maximum of six consecutive hours of operation (the specific hours to be decided by each licensed store), except for one store in each trading area which should be permitted to operate with no hours restrictions on a rotational basis for emergency service. In addition, the licensing body should be empowered in any given trading area where at least 75% of drugstores request it to adopt a rotational system.

The trade designation could be simply the phrase "stores selling drugs, medicines, medical appliances and other products usually sold in a drugstore", with an allowance for a 10% variance (based on total dollar volume of gross sales). This designation would have to be policed by the licensing body which could suspend or revoke the Sunday licence if the trade designation were not maintained.

The requirement for the registered pharmaceutical chemist to be on the premises would apply to the entire six hour period when the store was open.

The consecutive six hour period selected by each store that wished to open would be required to be filed with the licensing body as a condition of receiving a Sunday licence. The licence document issued should state the six hour period for which it applies and should be required to be prominently displayed in the front window of each store every Sunday when that store is open. Changes in the six hour period should be permitted as of right, but only after the licensing body has been notified and a new licence document indicating the new six hour period selected has been substituted for the old document.

The one store in each trading area to be unrestricted as to Sunday hours for emergency drug and medical needs of the public should be equitably rotated from week to week among those drugstores in each trading area which are willing to participate in the emergency service rotational scheme. The minimum number of hours necessary to justify such a scheme would be ten, and the emergency service provided in each trading area should be the same hours each Sunday by all those participating drugstores. The one store permitted to open each Sunday for emergency needs in each trading area should be required by the licensing body to advertise in the media on the previous Saturday the name and the hours of the store open. The other requirements of having a registered pharmaceutical chemist and main-

taining the suggested trade designation (with a 10% variance) should be enforced during opening hours under this emergency service rotational system.

As an optional method of regulation and containment, the licensing body should have the power to adopt a rotational system in each trading area for the regular six hour Sunday service when requested to do so by at least 75% of the drugstores in that trading area. This rotational system need not take any set form or involve a minimum or maximum of stores open each Sunday in a given trading area, but should be determined by the licensing body after consulting with all the drugstores in that area. No drug store should be compelled to participate in the rotational scheme if it wishes to remain closed Sundays. Those drugstores participating in the rotational system should be given equal opportunity to open Sundays in rotation, but should be subject to the normal trade designation, the requirement of having a registered pharmaceutical chemist on the premises, and the six hour limitation. If possible, the rotational system should specify the six hour opening period to be adopted by all participating stores, and the names and hours of the stores open each Sunday under the system should be published on Saturday in the local media.

The rotational system, once adopted, should stay in force until such time as at least one-third of the drugstores in the trading area expressly indicate to the licensing body that they are opposed to its continuance.

There are a number of voluntary rotational systems among drugstores in various parts of the province. For example, the Welland Pharmacists' Association in their brief to us described their voluntary plan which has been in operation for more than thirty years, under which the seven participating drugstores each open one week in seven on a rotating basis. There are two drugstores in Welland which have chosen not to participate in the plan, and who do not open at all on Sundays. The Association feels that this plan provides an adequate level of essential pharmaceutical service to the community on Sundays but without an unnecessary proliferation of drugstores on that day. In our view, the vesting of power in the licensing body to adopt a rotational system when requested by 75% of the drugstores in a given trading area will clearly permit existing voluntary plans such as the one in Welland to be put on a formal legal basis.

Finally, regardless of the methods of regulation and containment adopted, we would suggest that a clause similar to section 379a(9) of *The Municipal Act* be enacted exempting any pharmaceutical chemist or his employees from regulations and/or prosecution for supplying medicines, drugs or medical appliances at any time notwithstanding the existence of any Sunday restriction concerning drugstores generally.

3. *Restaurants*

One would normally expect that restaurants should be free of Sunday regulation and containment. The sale of prepared meals can be easily justified as essential on the basis of several of our determinants: humanitarian; recreational; familial; and convenience.

However, we are concerned about the extent to which some restaurants might engage in scrambled merchandising of food and non-food items to the point where an unfair competitive advantage is gained over those required by law to remain closed on Sunday. This practice has not been widespread in Ontario, but it well might be in the future if experience in other jurisdictions is any indication.

Accordingly, we would propose a trade designation through the use of the term "restaurants serving prepared food" and allow a variation of only 10% (based on dollar volume of gross sales) from that principal business before the benefit of the designation would be lost. This would be the same sort of standard that is contained in section 379a(1a) and 379a(1b) of *The Municipal Act* except the permitted variation would be only 10% instead of 30%. It would have the effect of prohibiting restaurants from being a guise for general food retailing or other forms of merchandising, yet still allow legitimate restaurants to sell a few items related or ancillary to their restaurant business. We see no need for licensing of the Sunday operator of restaurants with the above standard enforced through prosecutions.

4. *Variety, Convenience and Jug Milk Stores*

The public demand for these types of stores is significantly high. We noted in Chapter 6 that our attitudinal researchers determined that convenience and jug milk stores rank just behind gasoline service stations, drugstores and restaurants in establishing which the public thinks should be permitted to stay open on Sunday. Small individually-owned variety stores were not far behind. The phenomenal growth of these types of stores in Ontario since the late fifties, as a variation of the traditional "Mom and Pop" store, was described in Chapter 5. They emphasize convenience, fast service, accessibility, long hours and a moderate variety of food and a few non-food items. The hours in convenience and jug milk stores are usually 9 a.m.-11 p.m. seven days a week and Sunday is typically their biggest day, accounting for more than 20% of the week's sales. The hours and portions of the total week's business done on Sunday in variety stores do not follow as consistent a pattern as in convenience and jug milk stores, but there is no denying that Sunday is one of their biggest days.

The "essentiality" of these types of stores on Sundays is perhaps more difficult to establish than for most of the others in our list. Many of the products which they sell on Sundays are the same products found in grocery supermarkets which are required by law to remain closed on Sundays. For example, while the convenience and jug milk stores might emphasize milk and other dairy products

(items which have traditionally been regarded as "essential" on Sundays), these products typically account for only 25% of Sunday sales, with the rest being comprised of tobacco products (27%), groceries and bakery products (28%), confectioneries such as soft drinks and candies (11%), and other food and non-food sundries (9%) (these percentages are approximate figures only and can vary depending on the location and the season—see Chapters 5 and 7). Therefore it is difficult to establish "essentiality" on the basis of product alone. It is the *method* of sale, combined with the nature of the products, which gives these stores their "essential" characteristic.

It will be recalled that one of our determinants of essentiality was "convenience"—relating to the widespread demand for those consumable items used on a daily basis and without which consumers would be considerably inconvenienced if denied daily access to them. While both grocery supermarkets on the one hand and variety, convenience and jug milk stores on the other sell consumable items used on a daily basis, only the latter purport to do it *exclusively* and in a manner emphasizing *accessibility* rather than choice and variety through comparison of both items and stores. Thus, the distinguishing characteristics of variety, convenience and jug milk stores are (1) decentralized accessible locations, (2) limited order purchases (average customer purchase is approximately \$1 on a daily basis), (3) small premises, (4) few employees, (5) moderate size inventory with usually only one brand of each type of product, (6) higher prices (except for milk and other dairy products), (7) one check-out counter, and (8) limited parking. By way of contrast, supermarkets are distinguished by (1) centralized location, (2) large order purchases on a weekly basis (average customer purchase is approximately \$10–\$20), (3) large premises, (4) many employees, (5) large inventory with many brands of the same product permitting wide selection, (6) lower prices, (7) several check-out areas, and (8) substantial free parking area adjacent to store.

The various opinion and attitude surveys which we reviewed in Chapter 6 revealed that the public does distinguish between various types of stores in respect of Sunday openings, and would favour the convenience and jug milk stores, and to a lesser extent variety stores, but not supermarkets. We consider it both possible and desirable to reflect this widespread view in legislation by including variety, convenience and jug milk stores in our list of "essential" stores or establishments on the basis of the "convenience" determinant discussed above. We also believe that there is little difference today between variety stores and convenience and jug milk stores, making it possible to treat them on the same legislative basis.

The crucial question, however, is the method of regulating and containing these stores so that they do not lose their characteristic of "essentiality" and allow this to become a guise for gaining an unreasonable competitive Sunday advantage over those in the supermarket or other businesses required to close. We have already noted that convenience and jug milk stores alone have captured approximately 4½% of the total food market in Ontario, and that in the Toronto area the share is approaching 6%. If the food sold in variety

stores were included, the percentages would be higher. The growth projections of the two largest convenience and jug milk chains in Ontario would indicate that an even larger share of the total food market is contemplated. This has considerable significance for Sunday because it is clear that at least a portion (20%) of the share of the total food market obtained by convenience and jug milk stores in recent years can be attributed to their Sunday advantage since that is the approximate portion of the total week's business done on that day. We are concerned not to see a situation develop which will eventually trigger a widespread demand for an open commercial Sunday. Yet the extent to which the expansionary plans of the variety, convenience and jug milk stores are premised on the continuance of their Sunday advantage is a measure of the speed with which that situation will ultimately come.

Accordingly, we would propose that variety, convenience and jug milk stores be regulated and contained on Sundays by a province-wide licensing body applying the following three methods: (1) a maximum of three employees for the entire day, including the owner or manager; (2) a maximum of 2,000 square feet of combined sales and stock area which should not be merely a cordoned off portion of a larger store but which should relate to a store's entire operating area; and (3) a maximum of six consecutive hours of operation (the specific hours to be decided by each licensed store). In addition, the licensing body should be empowered to impose a rotational system on Sundays in those areas where, in the opinion of the licensing body, the convenience needs of the residents of the area would be adequately served by such a system.

In selecting these three methods of regulation and containment and rejecting others, we were influenced by a number of factors. The three employee maximum has been used successfully in both New Brunswick and Quebec. It is directly related to one of the primary purposes of the proposed legislation in protecting employees from being required to work on Sunday against their will.

The 2,000 square feet maximum for combined sales and stock area was arrived at after determining that most of the existing variety, convenience and jug milk stores in Ontario are probably smaller than this, with only a few of the newer stores, which are taking on many of the attributes of supermarkets, being larger than 2,000 square feet. We have also had access to a decision¹⁷ of the Ontario Municipal Board rendered on June 20, 1966 in the case of an appeal by *Rexdale Mall Limited* from the refusal of the Township of Etobicoke to change the zoning of a parcel of land from "Non-Retail Commercial" to "Limited Commercial". The Board, comprised of A. H. Arrell, Vice-Chairman, and V. S. Milburn, member, allowed the appeal so as to permit stores with no more than 1,800 square feet of floor space and selling "convenience goods" (i.e., drugstore, variety store, delicatessen or food shop) to operate in the area in question. The standard of 1,800 square feet was seized on since this was the largest existing store in the area to which the decision applied. The Board

¹⁷O.M.B. Decisions P 141-65 and P 791-66.

implied that it would have been prepared to accept 2,000 square feet to ensure a wide variety of goods for the apartment house dwellers in the area yet still maintain the character of those stores as "convenience" stores.

In our discussions with officials of Dominion Stores Limited, the largest food retailing chain in Ontario, they stated that the smallest new store which they had opened in Ontario in 1969 was 8,225 square feet of combined sales and stock area (5,425 square feet of sales area), and that while the company did not have a corporate policy on minimal square feet, it would not be likely to open a conventional supermarket under 2,500 square feet (or 2,000 sales area) and in fact had only four older stores in Ontario below these figures: one in Toronto with 1,990 square feet (1,426 sales area), one in Cobalt with 1,950 square feet (1,407 sales area), one in Carleton Place with 1,820 square feet (1,183 sales area) and one in Orangeville with 1,743 square feet (1,239 sales area).

In the United States, the average convenience store size would appear to be 2,400 square feet¹⁸ although there are significant differences as compared with Ontario because of beer and liquor sales and additional refrigeration equipment required to stock it. For example, one recent U.S. breakdown of convenience store sales by product indicates that 25% of sales are for liquor and beer.¹⁹ In any event, the 2,400 square feet average is generally regarded as the *optimum* size from the point of view of profit and is not necessarily related to fulfilling only "essential" needs according to our convenience determinant. A recent description of convenience store development in the U.S. pegged the square footage at between 1,000 and 3,200 square feet, as compared with an average supermarket size of 7,500 square feet.²⁰ In fact, the same study suggested that there was a consensus among convenience store operators that their stores should not exceed 4,000 square feet.

In a joint submission received after we were well on in our deliberations,²¹ the Becker Milk Company Limited and Mac's Milk Limited, the two largest convenience and jug milk store chains with 270 and 260 stores respectively in the province, stated that if some degree of regulation was deemed necessary (although they were opposed to any), they would favour a store space limitation of 2,400 square feet. However, we

¹⁸See the pamphlet entitled "Convenience Stores—Your Plan to Profit" prepared by Nolin Manufacturing Co. Inc., Montgomery, Alabama; also White and Cooper, *infra*, note 19, pp. 6, 9, 17; and "The Jackson Minit Market Convenience Store Study", in *Progressive Grocer*, October 1967, pp. 50-51.

¹⁹See White and Cooper, "Convenience Store Development in the U.S.", an unpublished paper prepared at the Graduate School of Business of Michigan State University, with the assistance and cooperation of the Food Marketing Program, (July 1967), p. 3 (the percentage breakdown is taken from an article entitled "A Supermarket Operator in the Convenience Field" appearing in the September 1965 issue of *Nargus Bulletin*, p. 38). In "The Jackson Minit Market Convenience Store Study" *ibid.*, beer accounted for 17.04% of total weekly sales of the stores surveyed.

²⁰White and Cooper, *ibid.*, pp. 8-9.

²¹This joint submission was received in written form on June 1, 1970. It was supplementary to separate briefs and oral submissions by these two companies in February 1970.

cannot help but note that in their original briefs,²² Mac's Milk Limited claimed that its average store was "relatively small in area, less than 2,000 square feet" and the Becker Milk Company stated that "the average size of our stores is about 1,200 square feet, the size of a normal 'variety' store", all of which leads us to the conclusion that the acceptance of 2,400 square feet by these two companies contains an expansionary cushion consistent with a much larger share of the total food market than at present, to be gained partially through a Sunday "essential" selling advantage.

In any event, it is our opinion that the standard should be stated as specifically including sales and stock area (and not just "store space") to eliminate any ambiguity which might give rise to evasion of the limitation through extraordinary stocking arrangements. Also, the standard should not be satisfied merely by closing or cordoning off part of a larger store since this would create too great a potential for evasion.

The consecutive six hour period selected by each variety, convenience and jug milk store that wished to open Sundays would be required to be filed with the licensing body as a condition of receiving a Sunday licence, the same as for drugstores. The licence document issued should state the six hour period for which it applies and should be required to be prominently displayed in the front window of each store every Sunday when that store is open. Changes in the consecutive six hour period should be permitted as of right, but only after the licensing body has been notified and a new licence document indicating the new period selected has been substituted for the old document.

Failure of a store to observe the "three employee", "2,000 square feet" and "six hour" maximum standards should result in the suspension or revocation of the store's Sunday licence.

The optional rotational system for these types of stores should be invoked in a trading area by the licensing body where one or more stores in the area requests it and it appears to the licensing body that the convenience needs of the residents, as measured by physical accessibility of stores and availability of a variety of consumable products used on a daily basis, can be adequately served on Sunday by such a system. We would not expect that rotational systems would be adopted in all trading areas of the province. Where they might be useful, however, is in trading areas which are oversaturated by these stores according to the foregoing standards. For example, there might be a situation in which three stores operate within one block of each other and are all within walking distance for the residents of the area. Even if one or two of these stores want to close on Sundays they are economically prevented from doing so if the third store decides to open. Yet the Sunday convenience needs of those residents might be adequately served by any one of these stores. It is this sort of situation in which the stores

²²Mac's Milk Limited brief received on February 5, 1970; oral submissions made by Mr. Craig Waldron, Secretary-Treasurer, on February 24, 1970. The Becker Milk Company Limited brief received on January 30, 1970; oral submissions made by Mr. Robert Lowe, President, on February 24, 1970.

who want to close might apply to the licensing body requesting the invocation of a rotational system applying to all stores in that particular area. Once the licensing body decided to adopt such a system (after considering the questions of accessibility and availability of products and consulting with all such stores in the area in question), it would be mandatory for all stores wishing to open Sundays in the area to participate in the manner determined by the licensing body. The other three standards would still be required whether a rotational system were adopted or not.

We have not proposed a product designation as a method of regulating and containing these stores on Sunday because of the difficulties in coming up with a list or definition of "essential" consumable items which might be acceptable to even the majority of consumers whose "essential" daily needs often vary according to the circumstances of the moment.

5. *Tobacco Shops and Newsstands*

We consider that consumer demand is sufficient for these types of establishments to render them "essential" by the convenience determinant. Also, we recognize a high recreational content in items sold at newsstands, i.e., magazines and newspapers for Sunday reading. In this age of enlightenment characterized by accessibility to all forms of media for news, information and entertainment, we consider it unreasonable to prohibit the sale of printed materials on Sundays. Indeed, we regard their wider use and enjoyment as part of the quality environment for leisure on that day.

To regulate and contain these types of stores and establishments so that they do not gain an unfair advantage through scrambled merchandising on Sundays, we would propose that they be restricted by three methods: (1) product designation; (2) a licensing system applying standards related to location; and (3) a maximum of six consecutive hours of their own choosing. The first method could be accomplished with the words "establishments whose principal trade consists of selling either tobacco products or printed materials published on a periodical basis with a frequency of at least four times per annum, or both" and then by imposing a 70% principal trade requirement, with wording similar to sections 379a(1a) and 379a(1b) of *The Municipal Act*. The second method related to licensing by location could be achieved through an assessment by the province-wide licensing body of need in each particular trading area, taking into account such factors as the extent to which the Sunday demand for tobacco products and news material is satisfied by drug stores and/or convenience and jug milk stores licensed for the area and the location of each licence applicant in terms of accessibility for potential customers. The six hour limitation could be achieved in much the same fashion as for drugstores and convenience and jug milk stores.

Tobacco shops and newsstands located in hotels, motels and other lodging facilities should not be subject to the licensing requirement except where it appears to the licensing body that more than 30% of the products of these establishments are sold to persons who are not guests at the hotel, motel or lodging facility.

6. *Confectionery and Candy Shops*

With these types of shops, essentiality can be established on the basis of a combination of the recreational, convenience and perishability determinants. Items such as soft drinks, ice cream, candy and potato chips have clearly become associated with a variety of leisure activities common on Sunday, particularly at spectator events. Items sold at these shops are popular with children, particularly during the summer months. Candy is a popular gift with people who go visiting on Sundays, or who are travelling. The necessity for maintaining the freshness of candy without preservatives through temperature control was emphasized by officials of Laura Secord Candy Shops Limited who appeared at the public hearings.

We would propose that these shops and establishments be regulated and contained on Sundays by a trade designation. However, we would not be in favour of including bakeshops within the term "confectionery". Wide-scale openings of bakeshops would give rise to substantial additional employment on Sundays and would also give an unfair advantage to bakeshops at the expense of grocery shops and those department stores which trade in baked goods.

Therefore, we would propose that the trade designation be stated as "confectionery and candy shops, but not including bakeshops", with a maximum variation of 10% allowed from that principal trade. As with restaurants we see no need to license the Sunday operation of these stores, provided they are held to their trade designation with only a 10% variance.

7. *Nurseries*

The retail nursery business, consisting of the sale of ornamental trees and shrubs and of growing outdoor plants and flowers, is a highly seasonal operation. Generally speaking, the bulk of the sales occur from the middle of April until the middle of June, with another brief spurt from the middle of September to the middle of October. These are the only periods in which it is safe to plant most trees, shrubs, plants and flowers of the outside variety. Therefore a case can be made for Sunday sales being "essential" at these periods.

Apart from essentiality because of the seasonal determinant, there is a recreational aspect to the purchase of nursery stock. Many of these establishments are located in the country adjacent to large urban centres and it is common for people, particularly family groups, to combine a Sunday drive in the country with the viewing of nursery plantings and shrubbery displays (and eventual purchase based on such viewing). An official of H.C. Downham Company Limited of Strathroy, a large wholesaler and retailer of nursery stock, told us at the public hearings that their retail operation did 65% of its business on Sunday during peak season, and that most of their retail competitors opened Sunday during peak season and it was probably their biggest day of the week.

We would propose that nurseries be regulated and contained by a time of year restriction and a product designation. The former should be a limitation to the months of April, May, the first fifteen days of June, the last fifteen days of September and the month of October. These times should permit adequate flexibility for these establishments during their peak periods. The latter could be achieved through the words "nurseries for the sale of growing trees, shrubs, plants and flowers for outdoor planting" with a 10% variance allowed for related items such as peat moss, fertilizer, insecticide, garden equipment, etc.

We do not consider that it would be necessary to license Sunday operations of nurseries.

8. *Fresh Fruit and Vegetable Stands*

Like nurseries, these establishments are largely seasonal in nature with the bulk of their business being done at the time when various types of fruit and vegetables are harvested in large quantities for mass consumption. While technology now permits fruit and vegetables to be stored for long periods of time or grown artificially in off-season, and while there is a significant amount of imported fruit and vegetables from the U.S.A. and other tropical areas brought into Ontario at all times of the year, the roadside stands selling fresh domestic fruit and vegetables and which dot the countryside throughout Ontario particularly in the summer and fall, are still a major attraction in this province. There is clearly a recreational aspect to this type of selling on Sunday for the many individuals and families who take their leisure through a drive in the country or for tourists in all parts of the province.

As with nurseries, we would propose both a time of year restriction and a product designation. The former should consist of a six month limitation to the period from May 1 to October 1 each year, or alternatively during the time when daylight saving time is in force throughout the province. The product designation should consist of the words "the sale of fresh fruit and vegetables", with a variance of 10% allowed for related products such as ice cream, paper napkins, sugar, etc. The enforcement of this product designation should ensure that the Sunday operations of these establishments do not become a guise for the operation of a grocery store on that day.

9. *Souvenir and Novelty Shops*

We consider these types of shops to be "essential" because of the recreational aspect of purchases usually made in them.

Many of them are found in tourist areas of the province, and it well might be that they should be regulated and contained by the special methods which we will propose specifically for tourist areas in a subsequent section of this chapter. However these shops are not restricted to tourist areas alone and indeed exist in substantial numbers in both the core and outlying areas of most Ontario cities. Tourists do not visit just selected vacation areas in middle belt and northern Ontario. They are equally attracted to such areas as downtown Ottawa

and Toronto or the Shakespearian Festival in Stratford or the falls at Niagara Falls, and the demand for souvenir and novelty items is equally great. Yet in permitting all souvenir and novelty shops to open on Sundays, there is always the danger of creating an inequitable situation if these shops utilize the technique of scrambled merchandising to gain an unfair advantage over department stores, china shops and furniture stores required by law to close.

Accordingly, we would propose that these shops be regulated and contained by three methods: (1) a strict trade designation; (2) a licensing requirement under which a province-wide licensing body would take into account tourist demand in any particular area where a licence was requested; and (3) a maximum of six consecutive hours of their own choosing. A standard which might be utilized in aid of the trade designation would be a requirement that 70% of all items in a store be sold at a price of \$10 or less, as a means of ensuring that it retained its "souvenir and novelty" characteristics. The major consideration in granting a Sunday licence should be location, and suitable standards might be worked out by the licensing body relating to the number of hotels and tourist attractions and the amount of non-resident traffic in each area. The six hour limitation could be achieved in much the same fashion as for drugstores, convenience and jug milk stores, and newsstands and tobacco shops.

10. *Antique Markets*

Again, this type of establishment has a high recreational content for its customers. Throughout the province, antique markets run individually or cooperatively by several entrepreneurs are held on Sundays in rural areas adjacent to large urban centres, or less frequently, in core area establishments. These markets often have a carnival air about them and are frequently attended by families as part of a Sunday outing. "Antique hunting" is fast becoming a popular sport as the people of Ontario become increasingly conscious of their cultural heritage. It is also an activity in which many tourists participate.

However, we are mindful of the possibility that the Sunday operations of this type of establishment could result in their gaining an unfair advantage over fine furniture stores and china shops required to close Sundays. Therefore, we would propose that they be subject to a provincial licensing requirement which would allow bona fide antique markets in each location to operate only 12 Sundays each year. For the great majority of markets which operate out-of-doors, this should be ample for Sunday operations during the spring, summer and fall when weather permits. For the more established markets operating in covered premises throughout the year, this would mean the holding of a market once a month or any other variation to accommodate the standard.

D. THE COORDINATION AND INTEGRATION OF METHODS

From the above discussion of the application of available methods to the ten types of essential Sunday selling, there emerge two patterns of regulation entailing separate legislative treatment. The first pattern, proposed for restaurants, confectionery and candy shops, nurseries, and

fruit and vegetable stands, contemplates a trade or product designation with potential prosecutions for non-compliance as the sole control or enforcement technique. This has been the traditional legislative approach used in most western countries in the past. It implies a certain amount of self-enforcement among members of the classes of business listed, and virtually no inspection or surveillance other than by members of the public who report infractions to the police.

The second pattern, proposed for gasoline service stations, drug-stores, variety, convenience and jug milk stores, tobacco shops and newsstands, souvenir and novelty shops and antique markets, also comprehends a trade or product designation but has a much more pervasive and effective means of control and enforcement through licensing and the legislative prescribing of standards to be applied by the licensing body. It involves not only the creation or designation of an appropriate licensing body and the prescription of standards for it to apply in respect of each type of essential Sunday selling, but the provision of machinery to receive and administer licence applications and documentation in support thereof, and the selection of the necessary procedures in respect of licence renewals, suspensions or revocations.

We are aware of the difficulties inherent in the creation of any new licensing scheme in this province. However, after carefully reviewing all the available methods for the regulation and containment of essential Sunday selling in general and then considering them in relation to particular classes of stores or establishments, we were forced to conclude that for the six classes mentioned (gasoline service stations, drugstores, variety, convenience and jug milk stores, tobacco shops and newsstands, souvenir and novelty shops and antique markets), licensing was the only means of achieving effective and equitable enforcement. In our view, most of the other methods of regulation and containment, taken alone or in combination, and enforced through prosecutions for non-compliance, are still subject to substantial evasion through scrambled merchandising or non-detection, to the extent that the preservation of Sunday as a day free from work for the pursuit of leisure activities with family and friends will gradually become eroded through either the increasing demand by other retailers for equal treatment or through wide-scale shop openings in defiance of the law.

Any law, to be a good law, must be both respected and capable of effective and equal enforcement. In our study and review of Sunday observance laws not only in Canada but in many other jurisdictions of the world, we have been struck by the universality of the phenomenon of unequal unenforcement and the resulting dissatisfaction and cynicism which it breeds. Those occasionally "caught" through prosecution under the traditional approach often experience the same feelings as the motorist who has been stopped by a traffic officer for exceeding the speed limit when he sees other cars proceeding equally fast but getting away unscathed while the officer makes out the summons, and who, at the moment, probably does not philosophically remind himself that an officer can only process one speeder at a time.

A licensing scheme for these six classes of stores and establishments will not eliminate this problem, of course, but will go a long way toward mitigating the inequities permitted by the present law while at the same time providing for community needs in a manner which will foster better public understanding and acceptance of the law's objectives.

We have proposed that a licensing scheme be applied only for the six classes of essential selling listed above, and not for the other four classes (restaurants, confectionery and candy shops, nurseries and fruit and vegetable stands). It may be that once a licensing scheme is set up, it would be administratively convenient and expedient to regulate and contain these other four classes through this control and enforcement mechanism as well. However, for the moment we consider an appropriate trade or product designation (with a 10% variance) and the other methods discussed earlier for each class, as sufficient for effective control and enforcement through prosecutions since the opportunities for evasion in these classes are not as great.

As for the structure and organization of the licensing body, and matters of procedure, appeals and judicial review, we would suggest that the recommendations in the Report of the Royal Commission Inquiry into Civil Rights, Report No. 1 (Ontario)²³ pertaining to licensing constitute the basic standards to be applied.

We would propose that the licensing body be appointed by the Lieutenant Governor in Council and hold office during pleasure. We would also propose that the licensing standards be contained in the Sunday legislation as far as possible. Any discretion granted to the licensing body should be stated to be subject to particular purposes or policies clearly expressed in the legislation.

Finally, great care should be taken to provide adequate procedural and judicial safeguards in respect of licence applications, refusals, renewals, suspension or revocations, to ensure that the control and enforcement is not only effective but fair.

E. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The Ontario scheme of Sunday laws should prohibit all forms of selling on Sunday except for certain clearly defined exceptions.

2. The exceptions from the general prohibition of Sunday selling should be based on their "essentiality", as measured by one or more of the following determinants: (1) humanitarian; (2) emergency; (3) perishability; (4) seasonal; (5) recreational; (6) familial; (7) convenience; and (8) technical. These determinants of essentiality should serve as rational guidelines against which demands for the Sunday operation of specific classes of stores and establishments can be easily assessed.

²³Royal Commission Inquiry into Civil Rights (Hon. J. C. McRuer, Commissioner), Report No. 1, Volume 3 (1968), pp. 1093-1134.

3. Any exceptions from the general prohibition of Sunday selling should be carefully regulated and contained in order that the intended purposes of the legislation will not be eroded by camouflaged selling of non-essential items through "scrambled merchandising".

4. The following methods of regulation and containment of "essential" Sunday selling are available for use in the legislation: (1) maximum number of employees; (2) maximum square footage; (3) product or trade designation; (4) maximum assessed value of premises or inventory; (5) hours limitation; (6) location restriction based on area and population density; (7) rotational system; (8) time of year; (9) type of management; (10) other physical limitations; and (11) licensing.

5. The following classes of stores and business establishments should be permitted to engage in "essential" Sunday selling, subject to regulation and containment: (1) gasoline service stations; (2) drugstores; (3) restaurants; (4) variety, convenience and jug milk stores; (5) tobacco shops and newsstands; (6) confectionery and candy shops; (7) nurseries; (8) fresh fruit and vegetable stands; (9) souvenir and novelty shops; and (10) antique markets.

6. Gasoline service stations should be regulated and contained on Sunday by: (1) a strict trade designation ("the retail sale of gasoline and other products necessary for the physical operation of motor vehicles, and including essential motor vehicle repairs") with a 10% allowable variance; and (2) a rotational system; both of which should be administered by a provincial licensing body for each trading area of the province. The rotational system should be adopted by the licensing body after canvassing the views of each service station operator in the area, and should ensure that one service station is open Sundays in every village, town and city, and thereafter to a maximum of 20% of normal weekday capacity with provision for a reduction to 5% in off-hours.

7. Drugstores should be regulated and contained on Sundays by: (1) a strict trade designation ("store selling drugs, medicines, medical appliances and other products usually sold in a drugstore") with a 10% allowable variance; (2) requiring a registered pharmaceutical chemist to be on the premises during all Sunday hours; and (3) a maximum of six consecutive hours of operation as determined by each store; all of which should be administered by a provincial licensing body. One drugstore in each trading area of the province should be permitted by the licensing body to operate with no hourly restriction on a rotational basis for emergency purposes. The licensing body should be empowered in any given trading area where at least 75% of drugstores request it to adopt a rotational system. Any pharmaceutical chemist or his employees who supply medicines, drugs or medical appliances for the relief of sickness, ailment or death should be exempted from the Sunday selling prohibition at all times.

8. Restaurants should be regulated and contained on Sundays by a strict trade designation ("restaurants serving prepared food") with a 10% allowable variance.

9. Variety, convenience and jug milk stores should be regulated and contained on Sundays by: (1) a maximum of three employees for the entire day including the owner or manager; (2) a maximum of 2,000 square feet of combined sales and stock area; (3) a maximum of six consecutive hours of operation as determined by each store; all of which should be administered by a provincial licensing body. In addition, the licensing body should be empowered, on application by one or more stores in a trading area, to impose a rotational system on Sundays for that area where in the opinion of the licensing body the convenience needs of the residents of the area would be adequately served by such a system.

10. Tobacco shops and newsstands should be regulated and contained on Sundays by: (1) a product designation ("establishments whose principal trade consists of selling either tobacco products or printed materials published on a periodical basis with a frequency of at least four times per annum, or both") with a 30% allowable variance; (2) an assessment of need in each trading area as determined by the licensing body having regard to such factors as accessibility to consumers and alternative sources of supply; and (3) a maximum of six consecutive hours of operation as determined by each store. Tobacco shops and newsstands located in hotels, motels and other lodging facilities should not be subject to the licensing requirement except where it appears to the licensing body that more than 30% of the products of these establishments are sold to persons who are not guests at the hotel, motel or lodging facility.

11. Confectionery and candy shops should be regulated and contained on Sundays by a strict trade designation ("confectionery and candy shops, but not including bakeshops") with a 10% allowable variance.

12. Nurseries should be regulated and contained on Sundays by: (1) a product designation ("nurseries for the sale of growing trees, shrubs, plants and flowers for outdoor planting") with a 10% allowable variance; and (2) a time of year limitation to the months of April, May, the first fifteen days of June, the last fifteen days of September and the month of October.

13. Fresh fruit and vegetable stands should be regulated and contained by: (1) a product designation ("the sale of fresh fruit and vegetables") with a 10% allowable variance; and (2) a time of year limitation to the period from May 1 to October 21, or alternatively, during the time when daylight saving time is in force throughout the province.

14. Souvenir and novelty shops should be regulated and contained on Sundays by: (1) a trade designation ("souvenir and novelty shops") with a price limitation ("... in which 70% of all items are sold at a price of \$10 or less"); (2) an assessment of tourist demand by the licensing body having regard to such factors as location and the presence of hotels and tourist attractions and the amount of non-resident traffic in each area; and (3) a maximum of six consecutive hours of operation as

determined by each store; all of which should be administered by a provincial licensing body.

15. Antique markets should be regulated and contained on Sunday by a restriction to twelve Sundays of their own choosing each year upon approval of the provincial licensing body that they are a bona fide antique market.

16. The provincial licensing body should be appointed by the Lieutenant-Governor in Council to hold office during pleasure. Licensing standards should be contained in the legislation as far as possible. Any discretion granted to the licensing body should be stated to be subject to particular purposes or policies clearly expressed in the legislation. The structure and organization of the licensing body and all matters of procedure, appeals and judicial review respecting licence applications, refusals, renewals, suspensions or revocations should conform to the recommendations of the Royal Commission Inquiry into Civil Rights, Report No. 1 (Ontario) pertaining to licensing.

CHAPTER 12

COMMERCIAL SERVICES, BUSINESSES AND THE EMPLOYMENT OF LABOUR ON SUNDAY

S U M M A R Y

- A. GENERAL PROHIBITION WITH "ESSENTIAL" EXCEPTIONS
- B. METHODS OF REGULATING AND CONTAINING "ESSENTIAL" EXCEPTIONS
 - 1. Hotels, Motels and Other Lodging Facilities
 - 2. Essential Maintenance and Domestic Services
 - 3. Services of Real Estate Agents
 - 4. Laundromats and Other Coin-operated Establishments
 - 5. Transportation Services
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 - 7. Communication Services
 - 8. Services to Protect Persons or Property in Danger of Injury or Destruction
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 - 11. Services which are of a Recreational, Entertainment or Cultural Nature
 - 12. Manufacturing, Production and Construction Services which must Operate Continuously as a matter of Technical or Economic Necessity
- C. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL PROHIBITION WITH "ESSENTIAL" EXCEPTIONS

Sunday selling of goods is not the only activity requiring regulation if the two objectives proposed in Chapter 9 are to be achieved. There is a wide variety of commercial selling activities not involving sale of goods but sale of *services* which must be prohibited by law on Sunday if that day is to be preserved as one free from work for the pursuit of leisure activities with family and friends. Also, there are a number of business activities, such as those carried on by financial institutions, not directly involving a sale of any kind but which, because of their commercial nature and large employment of people, would be inconsistent with the notion of a universal day of rest and leisure if allowed to operate on Sunday.

Section 4 of the federal *Lord's Day Act* makes it unlawful "to carry on or transact any business of [a person's] ordinary calling, or in connection with such calling, or for gain to do, or employ

any other person to do, on that day, any work, business or labour." While this section would appear to cover the sale of services, it does so *only* in respect of services which are part of a business of a person's *ordinary* calling, thus permitting commercial services on Sundays outside of that person's regular line of work (this might result in the "weekend" barber or part-time laundry operating on a Sunday).¹ It is true that section 4 prohibits a person "to do" for gain "any work, business or labour" on that day (or to employ any other person to do any work, business or labour). However, this prohibition might go too far in that it technically prohibits a self-employed or self-regulated person from doing any work on Sunday even though his place of business might be closed to the public. Thus, technically, the owner of a dry cleaning establishment is prohibited from doing his financial bookkeeping on Sunday, the teacher from preparing lessons, or the lawyer from working on files at home or in his office, even though these activities are often necessary and are in no way disruptive of the Sunday leisure environment if their business premises are closed.

In addition to the above difficulties with section 4 as a means of regulating Sunday commercial services, businesses and employment, we would again refer to the lack of present relevance of several items in the examples of "works of necessity or mercy" in section 11 of the federal Act, and the inherent difficulties with the prosecutory discretion granted by section 16.

Accordingly, we would propose that Ontario take a "clean slate" approach with respect to Sunday commercial services, businesses and employment and that they be generally prohibited (with certain clearly defined exceptions) as part of a plenary provincial scheme dealing with all aspects of Sunday. This prohibition, as supplementary to the Sunday selling prohibition, might be accomplished in the legislation with this wording: "It shall be unlawful on Sunday for any person (a) to engage in or conduct business or labour for profit in the usual manner and location or to operate a place of business open to the public; (b) to cause, direct or authorize any employee or agent to engage in or conduct business or labour for profit in the usual manner and location, or to operate a place of business open to the public."²

This wording has three advantages over section 4 of the federal Act. First, the phrase "in the usual manner and location" removes from the prohibition the work of self-employed or self-regulated persons (e.g., independent businessmen, teachers, lawyers) who bring their paperwork home on Sunday, or who work Sundays in their

¹In *Gordon v. The Queen*, [1961] S.C.R. 592, it was held by the Supreme Court of Canada that an owner of two coin-operated laundromats which were open on Sunday was "carrying on business of his *ordinary calling*", and therefore violating section 4 of the federal *Lord's Day Act*, even though the owner or his servants were not present on the premises on the Sunday in question. It was not indicated in the case report whether the laundromat business was the accused's regular line of work or merely a sideline.

²This wording is taken from a model state statute to provide for a common day of rest, appearing (with explanatory notes) in (1966), 3 Harv. J. Legis. 345.

office as long as it is closed to the public and staff are not present. Second, the phrase "for profit" removes from the prohibition any work for charity or for other voluntary purposes (e.g., for friends) as long as no business motive is involved. Third, the wording encompasses all types of commercial services, businesses and employments on Sunday *including selling* so that any Sunday selling activities not caught by the Sunday selling prohibition discussed in the previous section or contained in the list of stores and establishments specifically excepted would be caught by this section (unless contained in the list of commercial services to be excepted, discussed below). Also, the wording might be sufficiently broad to cover all other types of employment such as that in the manufacturing, production and construction industries (to be discussed in a later section of this chapter). It may even be desirable in the interests of precision and brevity in the legislation to integrate the prohibition and exceptions for Sunday selling of goods with the prohibition and exceptions for Sunday services and labour (as sections 4 and 11 of the federal *Lord's Day Act* purport to do). However, we think it provides greater clarity to deal with them separately, particularly since Sunday selling of goods seems to be the most likely activity, in the absence of legislation, to trigger a movement toward an open commercial Sunday, and thus requires separate and specific treatment.

In any event, the reasons for prohibiting commercial services, businesses and employment are much the same as for prohibiting Sunday selling of goods. The service industries³ are large employers of people in Ontario, employing 58.1% of the total employed labour force in the province (or 1,706,000 people as of 1969). This percentage has increased from 53.5% in 1960, and is likely to continue to increase. Our economic analysis and estimate of price increases would be equally applicable for Sunday selling of services as for Sunday selling of goods, although again this would vary depending on the extent to which employees were in a position to demand premium rates for Sunday work.

Finally, the prohibition of commercial services on Sunday can be justified on the basis of preserving a "quality environment" on that day for the pursuit of leisure activities. This would not be possible if financial institutions, laundry and dry cleaning establishments, hairdressers and barber shops, and like establishments were permitted to open — not only because they are large employers of people — but because they are disruptive of the type of leisure which most people wish to pursue on Sundays.

Having outlined the nature of and reasons for a general prohibition of commercial services, businesses and employment of labour on Sunday, we then considered what commercial activities should be excepted on the basis of "essentiality". Again we would make reference to the eight determinants of essentiality outlined in the previous section:

³The term "service industries" as used here is comprised of the following D.B.S. industry categorizations: (1) Transportation, communication and other utilities; (2) Trade; (3) Finance, insurance, real estate; (4) Community, business and personal service; (5) Public administration.

- (1) humanitarian
- (2) emergency
- (3) perishability
- (4) seasonal
- (5) recreational
- (6) familial
- (7) convenience
- (8) technical.

These determinants, applied earlier to essential Sunday selling, are equally useful as guidelines in assessing present and future demands for all types of businesses and services which might wish to operate on Sunday, without doing damage to the main objectives pursued through the general prohibition.

Utilizing these determinants in assessing *present* demands for commercial services, businesses and employment on Sunday, we would propose that the following be permitted to operate Sundays, subject to regulation and containment:

1. hotels, motels and other lodging facilities
2. essential maintenance and domestic services
3. services of real estate agents
4. laundromats and other coin-operated establishments
5. transportation services
6. power, water and heating services
7. communications services
8. services to protect persons or property in danger of injury or destruction
9. services ancillary to classes of stores or establishments excepted from the Sunday selling prohibition
10. services permitted under section 11 of the federal *Lord's Day Act*
11. services which are of a recreational, entertainment or cultural nature
12. manufacturing, production and construction services which must operate continuously as a matter of technical or economic necessity (see Chapter 14).

B. METHODS OF REGULATING AND CONTAINING "ESSENTIAL"

EXCEPTIONS

Unlike many of the classes of stores and establishments which we have proposed for essential Sunday selling, the various classes of commercial services listed above do not require a high degree of regulation and containment since they are capable of reasonably specific definition and do not have the same scope for scrambled merchandising as a technique of evasion. However, to the extent

that methods of regulation and containment are considered necessary, we would suggest that they be drawn from the inventory of eleven methods discussed in the previous chapter.

The following is a brief discussion as to the essentiality of each class of essential commercial service, and the methods of regulation and containment which we would propose.

1. *Hotels, Motels and Other Lodging Facilities*

These establishments have always been regarded as essential in Sunday observance laws throughout the world. In 1922, the Ontario Legislature recognized this essentiality when it enacted *The One Day's Rest in Seven Act* providing hotel, restaurant or café employees with twenty-four consecutive hours of rest in every seven days (it being implicit that it would be impossible to give all employees Sundays off). While hotels, restaurants and cafés are not listed as examples of "works of necessity or mercy" in section 11 of the federal *Lord's Day Act*, there are no reports of any prosecution ever being brought against one of them for a violation of section 4. The operation of hotels, motels and other lodging facilities is essential by virtue of the humanitarian, recreational and convenience determinants. They serve primarily the travelling public, and are regulated generally in Ontario by *The Hotel Registration of Guests Act*,⁴ *The Hotel Fire Safety Act*,⁵ *The Innkeepers Act*⁶ and *The Department of Tourism and Information Act*⁷.

It should not be necessary to regulate these establishments in respect of their Sunday operations except to the extent that they contain stores, shops or commercial services which are either prohibited or regulated on Sunday, in which case they should be subject to the proposals we have put forth for these stores, shops or services. It will be recalled that we proposed that tobacco shops and newsstands in hotels, motels and other lodging facilities should not be subject to a licensing requirement except where it appears to the licensing body that more than 30% of the products of these establishments are sold to persons who are not guests at the hotel, motel or lodging facility.

2. *Essential Maintenance and Domestic Services*

This exception contemplates both essential maintenance work in commercial establishments, and domestic services in private homes. In the case of the former, Sunday is often the only day where certain maintenance work such as repair of machinery or scrubbing of floors can properly be carried out and thus essentiality is established by both the emergency and technical determinants. In the case of domestic services, essentiality can be established by the humanitarian and convenience determinants.

⁴R.S.O. 1960, c. 180.

⁵R.S.O. 1960, c. 179; amended 1960-61, c. 36; amended 1964, c. 41; amended 1967, c. 37.

⁶R.S.O. 1960, c. 189.

⁷S.O. 1966, c. 44; amended 1967, c. 24.

As for the legislative definition of maintenance services (as a means of regulation and containment), we would propose the following wording: "essential maintenance of buildings, equipment and machinery". We would not propose any regulation for domestic services other than a requirement of one day's rest in seven, to be discussed later.

3. *Services of Real Estate Agents*

This is a type of Sunday service which is now fairly common with respect to "open house" showings of new homes and apartments in many of the urban centres of Ontario. The inspection of living quarters with a view to purchase or rental is a matter in most cases requiring the involvement of the family rather than the individual. We consider this to be an "essential" type of service according to the familial determinant, since Sunday is often the only day when the family has sufficient time together for this sort of activity. Whether the inspection takes the form of agents for a developer holding an "open house" for the showing of new model homes or suites, or merely the showing of an individual home or suites to prospective purchasers, the activity is "essential" to the purchasers and involves Sunday work for comparatively few employees for the benefit and convenience derived by many customers.

However, we are concerned that Sunday real estate services might cause undue interference with the Sunday leisure activities and quality environment of those persons already living in or adjacent to the premises to be sold or leased. Therefore, the one restriction we would propose is that the showing of premises by real estate agents or their employees not be permitted on Sundays for those houses which are occupied or for those apartment buildings or attached town-houses which are occupied to the extent of 50% of the units.

As for the actual *sale* or *rental* of premises on Sunday, we would propose that this *not* be permitted, and should fall within the general prohibition against Sunday selling since it involves a substantial number of ancillary services such as financial institutions, lawyers and registry officials, which services we would include within the general Sunday prohibition because of the large number of employees and general commercialism that might be involved.

4. *Laundromats and Other Coin-operated Establishments*

The provision of services and goods through coin-operated machines would appear to be increasing. In addition to laundromats, there are coin-operated car washes, dry cleaning establishments, gasoline pumps, and food vending machines of all kinds. To the extent that these establishments meet a demand without creating substantial Sunday employment and interference with the leisure environment on that day, we would propose that they be allowed. They can be justified in most cases by the convenience or emergency determinants of essentiality.

The one method of regulation we would propose is an employment limitation which restricts each establishment on Sunday to one employee (including the owner or manager) for maintenance and security purposes only.

5. *Transportation Services*

Because of the recreational, emergency and technical determinants, we would propose that all forms of transportation of *persons* be allowed on Sundays. To the extent that the province has the constitutional jurisdiction, this would permit railways, buses, trolleys, subways, taxis, limousines, airlines, ships and rented cars to carry persons on Sunday for a price. We see no necessity for any special methods of regulation or containment.

However, we would make it clear that this general exception for transportation of *persons* should *not* extend to transportation of *freight* on Sundays, except by special permission granted by the administrative tribunal or government department responsible for the general regulation of those transportation undertakings within provincial jurisdiction. While we would have no objection to blanket Sunday licences being granted for the transportation of freight on *railway*⁸ and *shipping undertakings*⁹ (including loading and unloading), we would strongly oppose any wide-scale permission for *Sunday trucking*. In our view, Sunday trucking would be most destructive of the type of Sunday leisure environment which we wish to preserve, particularly for recreational driving on the main highways in the province or on those access routes going to and from recreational areas. It would also contribute substantially to noise pollution in or near residential and recreational areas. Our view was confirmed by several of the submissions made in briefs or at the public hearings in which considerable opposition was expressed to the recent applications before the Canadian Transport Commission of three large trucking firms (all subsidiaries of the C.P.R.) for permission to give unrestricted continuous freight services on Sundays.¹⁰

We appreciate that in some instances it is necessary to allow trucks carrying perishable freight to operate during part or all of Sunday in order to preserve their perishable load or to provide distant parts of the province with fresh foodstuffs on Monday morning. Accordingly, we would propose that the Ontario Highway Transport Board be given powers to grant Sunday perishable freight licences stating the permitted hours of Sunday operation and the perishable products for which the licence was applicable. A separate licence should be required for each vehicle a trucking firm wishes to operate

⁸The railways under provincial jurisdiction in Ontario are those referred to in *The Ontario Northland Transportation Commission Act* R.S.O. 1960, c. 276; amended 1960-61, c. 69; amended 1964, c. 83; amended 1966, c. 107; the GO Transit System; and the Toronto subway.

⁹See *The Ferries Act* R.S.O. 1960, c. 141, and *The Wharfs and Harbours Act* R.S.O. 1960, c. 429.

¹⁰On January 24, 1970, applications were made to the Canadian Transport Commission by Smith Transport Limited, H. Smith Transport Ltée. and Norman's Transfer Limited for permission to give unrestricted freight service by motor vehicle on Sunday between certain points in all provinces of Canada. At least 36 interventions were filed on these applications, and all but two of them were in opposition including interventions from the Ontario and Quebec governments. The three applications were adjourned *sine die* on April 6, 1970, pending a determination within the motor vehicle transport industry of acceptable guidelines for Sunday operations. On July 21, 1970, the three applications were discontinued by order of the Motor Vehicle Transport Committee of the Canadian Transport Commission.

on Sunday for the transport of perishables, thus allowing the Board some control as to the number of trucks to be exempted from the Sunday prohibition.

In setting the hours of permitted operation in each Sunday trucking licence, the Board should be required to take into account the specific purpose for which it is to be used and seasonal variations (keeping in mind the general purposes of the provincial Sunday legislation). For example, if a prospective Sunday trucking licensee wished to transport fresh fruit from the orchards to the storage warehouse near the main market, it might be necessary for the Sunday licence to permit trucking for the entire day; but if the prospective licensee was a grocery wholesaler who wished to transport such items as fresh bread or other bakery products to outlying parts of the province in time for Monday morning openings, the licence might stipulate the permitted hours as commencing at 6 p.m. or 9 p.m.; and it might be considered advisable to stipulate a later starting time such as 9 p.m. in the summer months (May-October) while 6 p.m. might be acceptable in the winter months (November-April), since recreational driving is more frequent in the early evening during the summer months.

All freight traffic on transportation undertakings within *federal* jurisdiction (which includes interprovincial and international trucking) is subject to the authority of the Canadian Transport Commission.¹¹ The licensing powers which we have proposed above could apply only in respect of freight traffic of transportation undertakings within provincial jurisdiction (generally, intraprovincial operations). With respect to the regulation of motor vehicle transport in general, the federal Parliament delegated its regulatory jurisdiction to the provinces by enacting the *Motor Vehicle Transport Act*¹² in 1954 following the decision of the Judicial Committee of the Privy Council in the *Winner* case.¹³ This delegation was declared constitutionally valid by the Supreme Court of Canada in the *Coughlin* case¹⁴ in 1968, and has been exercised by a Motor Vehicle Transport Board in virtually every province in such a way as to make regulation of federal motor vehicle transportation virtually the same as regulation of provincial motor vehicle transportation¹⁵ although the federal Parliament still has the right to withdraw its delegation at any time. In Ontario, this delegated federal power is exercised by the Ontario Highway Transport Board.¹⁶

¹¹See section 11(x) of the *Lord's Day Act*, R.C.S. 1952, c. 171; amended by the *National Transportation Act*, S.C. 1966-67, c. 69, s. 94.

¹²S.C. 1954, c. 59.

¹³*Attorney-General for Ontario v. Winner*, [1954] A.C. 541.

¹⁴*Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569.

¹⁵See *Re H. & M. Express Lines Ltd. and Highway Traffic and Motor Transport Board* (1969), 3 D.L.R. (3d) 69 in which the Manitoba Court of Appeal held that the Manitoba Board, in exercising the authority delegated to it by Parliament, had a complete discretion to grant or refuse a licence for an interprovincial carrier, and to impose terms and conditions consistent with the Manitoba legislation and regulations affecting provincial transportation undertakings. See also *R. v. Beaney* (1969), 4 D.L.R. (3d) 369 (Co. Ct., Ontario).

¹⁶See *Ontario Highway Transport Board Act* R.S.O. 1960, c. 273; amended S.O. 1960-61, c. 65; amended S.O. 1961-62, c. 92. The provincial powers of this Board are contained in *The Public Commercial Vehicles Act* R.S.O. 1960, c. 319; amended S.O. 1961-62; amended S.O. 1968, c. 105.

In our opinion, there would be many advantages in having a similar delegation arrangement in respect of Sunday trucking, not the least of which would be uniformity of regulation of all trucks (subject to either federal or provincial jurisdiction) in each province. Therefore we would propose that the government of Ontario request the government of Canada to expand the federal delegation to the provinces of motor vehicle transport regulation in the *Motor Vehicle Transport Act* so as to include the regulation of Sunday trucking, and to amend the federal *Lord's Day Act* accordingly.

6. *Power, Water and Heating Services*

Included among these services would be the supplying of electricity, water, natural gas, fuel oil, coal and other fuels; the repair and maintenance of heating, refrigeration and cooling equipment; and the operation and maintenance of cold storage lockers and warehouses. There is no question as to the necessity for these services on a continuous basis on the grounds of the technical, humanitarian and emergency determinants except to the extent that the supply of such heating commodities as oil or coal or non-essential repair work requires men to work on Sundays when these services could just as easily be supplied on other days of the week.

Therefore the one restriction we would propose is that the permitted activities exclude "delivery, repair or maintenance work which is not of an essential nature".

7. *Communication Services*

This categorization would include telephone, telex, telegraph and messenger services; radio and television broadcasting; television cable; and newspaper publication and distribution. As with power, water and heating services, these types of services are widely acknowledged as essential on a daily, if not continuous, basis. Sunday employment in the communications industry has been common for many years now, it being recognized that the almost universal public requirement for essential communication services and for information through the media overrides the Sunday pause day rights of those few persons required to work to provide the services and information. Even the 1906 federal *Lord's Day Act* permitted work after 6 p.m. on Sunday in the preparation of the regular Monday morning edition of a daily newspaper.

We appreciate that the provinces do not have direct jurisdiction over interprovincial telephone, telex or telegraph systems, nor over radio and television broadcasting. This well might be an area where complementary federal legislation is required.

The only restriction we would suggest here (apart from a requirement of one day's rest in seven, to be discussed in Chapter 18) is that Sunday employment not be permitted in these various types of communications services where it is not *directly* related to the *daily* or *continuous* operation of the communications facility in question.

8. *Services to Protect Persons or Property in Danger of Injury or Destruction*

This is a broader category which would require interpretation by the Courts in borderline cases that might arise from time to time. Clearly, it would include the operation of hospitals and nursing homes; ambulance services; police and fire protection services; plant and industrial protection and security services; construction of buildings or equipment following storms or other emergencies; certain essential professional services of doctors, nurses, dentists, lawyers, social workers and counsellors; and funeral homes and burial services. There has never been any particular need for regulating or containing these types of services on Sundays through more detailed definition, and accordingly, we would propose that this category stand in its present general form with no other qualifications attached.

9. *Services Ancillary to Classes of Stores or Establishments Excepted from the Sunday Selling Prohibition*

In the previous section, we listed ten classes of stores and establishments which should be excepted from a general prohibition against Sunday selling. There are certain services within these stores or establishments which are often considered essential to their operation such as movement of inventory, check out services, parking lot services and maintenance.

For greater clarity, we would propose that all services ancillary to essential Sunday selling be permitted but with the proviso that these ancillary services be permitted *only* if they are performed *on the premises* of the store or establishment and are *directly related* to the items permitted to be sold. With this proviso, Sunday deliveries to or from the store or establishment, or work in a storage warehouse at another location would not be permitted.

10. *Services Permitted under Section 11 of the Federal Lord's Day Act*

While we have already commented on the lack of present relevance of many of the permitted activities in section 11 of the federal Act, we can see certain advantages in referring to the entire section in the secular provincial legislation proposed. Primarily it would provide for the effective integration of the provincial scheme with the existing federal scheme by reducing the possibility of conflict between the two such as where an activity caught by a general provincial prohibition might be considered as permitted under the federal list of permissions in section 11. Also, it would *indirectly* allow for the exception of certain religious services which would be otherwise prohibited by the provincial secular prohibition relating to services in general, by bringing in section 11(a) of the federal Act: "any necessary or customary work in connection with divine worship". This would still allow the provincial scheme to retain its secular character, yet would go a long way toward the elimination of possible conflict with the religious federal Act.

11. *Services which are of a Recreational, Entertainment or Cultural Nature*

These will be discussed in Chapter 13.

12. *Manufacturing, Production and Construction Services which must Operate Continuously as a Matter of Technical or Economic Necessity*

The rationale for this type of exception and the specific industries which we would propose be excepted are discussed in Chapter 14.

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The Ontario scheme of Sunday laws should prohibit commercial services, businesses, and the employment of labour on Sunday except for certain clearly defined exceptions. This prohibition should be supplementary to the general prohibition of selling on Sunday, and should be stated in the following words: "It shall be unlawful on Sunday for any person (a) to engage in or conduct business or labour for profit in the usual manner and location or to operate a place of business open to the public; (b) to cause, direct or authorize any employee or agent to engage in or conduct business or labour for profit in the usual manner and location, or to operate a place of business open to the public."

2. The exceptions from the prohibition in 1. should be based on their "essentiality", as measured by one or more of the following determinants: (1) humanitarian; (2) emergency; (3) perishability; (4) seasonal; (5) recreational; (6) familial; (7) convenience; and (8) technical. These determinants of essentiality should serve as rational guidelines against which demands for the Sunday operation of commercial services, and businesses and the employment of labour on Sunday can be easily assessed.

3. The following commercial services, businesses and employment of labour should be permitted on Sunday, subject to regulation and containment: (1) hotels, motels and other lodging facilities; (2) essential maintenance and domestic services; (3) services of real estate agents; (4) laundromats and other coin-operated establishments; (5) transportation services; (6) power, water and heating services; (7) communications services; (8) services to protect persons or property in danger of injury or destruction; (9) services ancillary to classes of stores or establishments excepted from the Sunday selling prohibition; (10) services permitted under section 11 of the federal *Lord's Day Act*; (11) services which are of a recreational, entertainment or cultural nature; and (12) manufacturing, production and construction services which must operate continuously as a matter of technical or economic necessity.

4. Hotels, motels and other lodging facilities should not be specially regulated in respect of Sunday operations except to the extent that they contain stores, shops or commercial services which are either prohibited or regulated on Sunday, in which case they should be subject to the proposals we have put forth for these stores, shops or services.

5. Essential maintenance and domestic services should not be specially regulated in respect of their performance on Sundays except by the term "essential maintenance of buildings, equipment and machinery and domestic services".

6. Services of real estate agents should be permitted on Sunday except in respect of houses which are occupied or apartment buildings or attached town-houses which are occupied to the extent of 50% of the units. The actual sale or rental of premises on Sunday should be prohibited.

7. Laundromats and other coin-operated establishments should not be specially regulated in respect of Sunday operations except by a limitation to a maximum of one employee (including the owner or manager) for maintenance and security purposes.

8. Transportation of persons on Sundays should not be specially regulated. Transportation of freight on Sunday should be regulated by licences granted by the administrative tribunal or government department responsible for the general regulation of those transportation undertakings within provincial jurisdiction. In particular, Sunday trucking should be regulated by the Ontario Highway Transport Board and should be prohibited except for the transportation of perishable freight under the authority of a special perishable freight licence granted by the Board stating the permitted hours of Sunday operation and the perishable products for which the licence is applicable. The government of Ontario should request the government of Canada to delegate to the Ontario Highway Transport Board the regulation of Sunday trucking in Ontario which is now under federal jurisdiction. Also, the government of Canada should be requested to amend section 11(x) of the federal *Lord's Day Act* to reflect this arrangement.

9. Power, water and heating services should not be specially regulated on Sundays except for a prohibition of delivery, repair or maintenance work which is not of an essential nature.

10. Communications services should not be specially regulated on Sundays except for a prohibition of those services not directly related to the daily or continuous operation of the communications facility in question.

11. Services to protect persons or property in danger of injury or destruction should not be regulated on Sundays.

12. Services ancillary to classes of stores or establishments excepted from the Sunday selling prohibition should be regulated by the requirement that they be performed on the premises of the store or establishment in question and be directly related to the items permitted to be sold.

CHAPTER 13

RECREATIONAL, ENTERTAINMENT AND CULTURAL FACILITIES ON SUNDAY

S U M M A R Y

- A. GENERAL PERMISSION, BUT SUBJECT TO LOCAL REGULATION
- B. HUNTING ON SUNDAY
- C. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL PERMISSION, BUT SUBJECT TO LOCAL REGULATION

In sharp contrast to the public's opposition to various forms of Sunday selling and commercial business, we found through our public hearings and independent research that most people seem to favour greater accessibility to recreational, entertainment and cultural facilities on Sunday. This position was expressed generally with respect to both commercial and non-commercial facilities of these kinds. While some church groups were opposed to such commercial facilities as movies and professional sports on Sundays, the 502 persons personally interviewed in the province-wide opinion survey conducted by our attitudinal researchers seemed favourably disposed toward most types of recreational, entertainment and cultural facilities potentially available (see Chapter 6) and made virtually no distinction between professional and amateur sports on Sundays, responding favourably to both.¹

The principal problem in providing greater accessibility to recreational, entertainment and cultural facilities on Sunday is that certain people are required to work to provide these facilities. This was recognized by a number of persons at the public hearings. Ushers and ticket takers must work at movie theatres, stadium attendants at football games, gatekeepers at parks, lifeguards at swimming pools, etc. A sound approach to governmental regulation of any business facility on Sunday would involve a utilitarian balancing of competing claims between the public demand for the use of a particular facility and the demands for Sunday off by those employees required to operate the facility, to provide the greatest good for the greatest number. While ideally one might examine each type of recreational, entertainment and cultural facility in this light, we can perceive a clear categorical break between all these types of facilities on the one hand, and commercial selling and general business facilities on the other, at least sufficient to suggest that the latter should be prohibited in the interests of the employees while the former should

¹Of the 502 persons interviewed in the province-wide sample selected by our attitudinal researchers, 74% favoured amateur sports on Sunday and 73% favoured professional sports on that day. Only dances, discotheques and coffee houses (46%); horse races (45%); and billiard halls (43%) failed to achieve majority support among all the various types of recreational, entertainment and cultural facilities included in the survey.

not, in the interests of those many thousands of people who might otherwise be deprived of leisure activities of their own choosing. Put another way, we do not think the privilege of shopping or doing business on Sunday is worth the social cost of denying the *many* employees in those facilities their Sunday off. But with recreation, entertainment and culture, we are prepared to have the *few* employees providing such facilities work Sundays to provide leisure pursuits and social benefits for many. Either way, social cost is minimized, both quantitatively and qualitatively. It must be remembered that protecting labour from Sunday work is not our only objective. The other is to create and preserve a "quality" environment for leisure activities of one's own choosing with family and friends, an objective which depends on the presence of recreation, entertainment and culture of all types.

In short, no longer can Sunday be regarded merely as a day of rest or non-activity. The public demand for leisure activities of all kinds on that day requires that a fresh look be taken at the existing law which *prohibits* all recreational, entertainment and cultural activities for a price² and then allows specific isolated exceptions for such categories as sports, concerts, movies, fairs and horse races—if the municipal council in each area approves and the event does not commence before 1.30 p.m.³ We would suggest that this use of a universal negative—with isolated regulated permissions available on a local option basis—is based on preventing the profanation of the Lord's day and is neither appropriate for nor consistent with the purposes of a secular Sunday which we proposed earlier. If Sunday is to be a day for the pursuit of leisure activities of one's own choosing with family and friends, then surely that choice should not be unduly encumbered by universal negatives or even limited permissions founded on notions of religious propriety or moral preference.

We would therefore advocate a distinct break from the historic "profanation of the Lord's day" type of legislation in Ontario by proposing that *all* recreational, entertainment or cultural facilities in the province be *permitted* to operate at any time on Sundays, subject only to municipal regulation or prohibition by bylaw. The universal permission in the province should not be limited to specific areas, activities or times, but should be absolute—subject to modification *only* in those municipalities where the municipal council sees fit to initiate regulatory or prohibiting bylaws for secular purposes.

The adoption of this proposal would clearly reverse the traditional legislative process which regarded many forms of recreation, entertainment and culture on Sunday as undesirable or sinful, and instead would permit them to be treated as "positive virtues", or at least "tolerated activities" within local regulatory limits. And it would clearly mark the provincial legislative scheme which we have proposed for all aspects of Sunday as secular and not religious in nature, and thus be consistent with our primary objectives and purposes from both a constitutional and policy point of view.

²*Lord's Day Act*, R.S.C. 1952, c. 171, s. 6.

³*The Lord's Day (Ontario) Act*, S.O. 1960-61, c. 50; amended by S.O. 1965, c. 66; further amended by S.O. 1968, c. 68.

In this light, we would propose that the universal provincial permission *not* contain any statutory time of commencement such as 1.30 p.m. which would give the appearance of protecting church attendance, nor should a municipal council which attempts to regulate certain recreational, entertainment or cultural activities set specific hours of operation for religious rather than secular purposes. The 1.30 p.m. starting time for all facilities covered under the present *Lord's Day (Ontario) Act* often proves impractical and unworkable, as recent experiences of the Canadian National Exhibition, the Western Fair and the Woodbine racetrack have demonstrated (these are documented for 1968 and 1969 in Chapters 6 and 7). While we have no desire to impose obstacles to religious observance throughout the province, we do not believe it is the role of the *state* to provide support for any one religion, regardless of whether the adherents of one religion form the majority of the population or not. Therefore, we would advise against the province establishing any hours of commencement or termination which would be construed as protecting or promoting religious observance. If recreational entertainment and cultural facilities are to be considered desirable on Sunday, as we have proposed, then the time of their enjoyment should be determined by those who operate them in response to public demand.

In our public hearings, some submissions were made to the effect that the province should make qualitative distinctions between various types of recreational, entertainment and cultural facilities on Sunday, prohibiting some such as billiard halls or discotheques, but permitting others such as golf courses or museums. To a large extent these submissions were based more on particular likes and dislikes for particular facilities at any time, rather than just their Sunday operations. In our opinion, it would be inadvisable to make qualitative distinctions of this sort on a province-wide basis. The diversity of socio-cultural backgrounds among Ontarians throughout the province and the variety of opinions, tastes and preferences related to recreational, entertainment and cultural facilities make this a task which the provincial government would do well to avoid.

Yet it should still be possible for local opinions, tastes and preferences to be reflected at the municipal level through bylaws regulating or even prohibiting certain facilities considered by the municipal councils to be inconsistent with the type of Sunday leisure environment desired by the majority in that municipality. Thus, if the residents of a certain community want to prohibit, say, billiard halls or limit their hours of operation, they need only ask their municipal council to do so; otherwise such facilities would be permitted. In this respect, the provincial legislative provision granting the municipalities the power to regulate or prohibit any recreational, entertainment, or cultural facilities within their boundaries would be delegated legislation similar to sections 379a and 379b of *The Municipal Act*⁴ which provide for municipal shop and gasoline service station regulation and closing.

⁴R.S.O. 1960, c. 249; amended by S.O. 1961-62, c. 86, s. 43; amended by S.O. 1964, c. 68, s. 10; amended by S.O. 1965, c. 77, s. 28(1) to (3); and amended by S.O. 1966, c. 93, s. 24.

However, we would propose that where *regional* municipal governments are in existence, the regulatory and prohibitory powers for recreational, entertainment and cultural facilities be delegated to the regional government unit and not to each municipal government within the region. This would go a long way toward eliminating unfair competitive situations between owners of such facilities in adjacent municipalities in a region where one municipal council had regulated or prohibited certain facilities and the municipal council in the adjoining municipality had not.

B. HUNTING ON SUNDAY

By a regulation⁵ promulgated under the authority of *The Game and Fish Act*⁶ in Ontario, no person is permitted to carry or discharge a firearm (other than a long-bow or a cross-bow) for the purpose of hunting on a Sunday in any county (with three exceptions⁷) or in certain territorial districts located, for the most part, south of the French and Mattawa Rivers.⁸ This Sunday hunting prohibition dates back before the turn of the century, and when first brought into force was undoubtedly motivated by the noise of firearms on Sunday and concern over the widespread participation in an activity deemed to be a profanation of the Lord's day.

Section 9 of the federal *Lord's Day Act* makes it an offence to shoot a firearm (1) for gain; or (2) in such a manner or in such places as to disturb other persons in attendance at public worship or in the observance of the Lord's day. If there is no gain or Sunday disturbance, then section 9 is not applicable. Thus it creates a much narrower range of offence than does the provincial regulation. One can therefore commit the provincial offence without committing the federal offence, but not vice versa.

The constitutional validity of a provincial Sunday hunting prohibition was upheld in *R. v. Paling*⁹ by the Manitoba Court of Appeal in 1946. The Court there unanimously decided that the provincial prohibition, as part of *The Game and Fisheries Act* in that province, was directed towards the protection of game and not the religious observance of Sunday, and was therefore constitutionally valid as secular legislation, although it was admitted that the Sunday prohibition might coincidentally conform to the religious ideas of some people. Richards, J. A.

⁵O. Reg. 409/69.

⁶S.O. 1961-62, c. 48, s. 83(22).

⁷The excepted counties as of October 23, 1969 are:

- (i) the County of Renfrew except the Township of Raglan,
- (ii) the United Counties of Prescott and Russell, and
- (iii) the Township of Haldimand in the United Counties of Northumberland and Durham.

⁸The territorial districts in which the prohibition applies are described in the legislation as:

the territorial districts of Muskoka or Parry Sound or that part of the Territorial District of Nipissing comprising the geographic townships of Boulter and Chisholm and the parts of the geographic townships of Ballantyne, Butt, Finlayson, McCraney and Paxton lying west of the westerly boundary of Algonquin Provincial Park.

⁹[1946] 3 D.L.R. 54.

in that case noted that without the prohibition, the barrage on a Sunday shooting would be many times as great as on a weekday so that this was greater proof of its game protection purpose.

We received no submissions in the briefs or at the public hearings respecting hunting on Sundays. However, we made inquiries of officials in the Ontario Department of Lands and Forests which administers *The Game and Fish Act*, to determine the purpose of the regulation and any other information concerning its administration. We were advised that the background to the regulation was simply observance of the "blue Sunday" concepts of earlier years and the fact that some people objected to the noise of the discharge of fire-arms on that day. It was also stated that there is no biological basis for prohibiting Sunday hunting. These officials also explained that when the new *Game and Fish Act* replaced the old *Game and Fisheries Act*¹⁰ in 1962,¹¹ the Sunday hunting prohibition was transferred from the statute into a regulation to permit more flexibility in formally excluding certain areas from the prohibition, particularly those areas north of the French and Mattawa Rivers which had always been excluded as a practical matter by virtue of non-enforcement of the prohibition. Under present practices, if a particular county or township wants to be excluded from the prohibition the Minister will consider recommending amendment of the regulation if the county or township council passes a resolution favouring such an amendment. O. Reg. 409/69 indicates the specific counties, districts and townships which are now excluded.

In the last fiscal year (1969-70), there were 79 prosecutions instituted for violations of the regulation. The Act generally is enforced by Conservation officers who lay charges and prosecute in the usual way.

Since there would not appear to be any "game preservation" purpose attached to the prohibition and since hunting is a popular form of recreation in many parts of Ontario, we would propose that the regulation be repealed. For us to countenance its continuance would be inconsistent with the position we have taken in respect of all other forms of recreation, entertainment and culture on Sunday—that they be universally permitted subject only to local regulation and prohibition for secular purposes. Local regulatory power for those communities that want it could then be included as part of the general regulatory power respecting all forms of Sunday recreation, entertainment or culture. Of course, it would still be an offence throughout the province to hunt commercially or in a manner disturbing religious worship under section 9 of the federal *Lord's Day Act* as long as it remains in force.

In any event, we would not be in favour of any province-wide prohibitive regulation of recreation which implicitly makes a qualitative judgment for all Ontarians about the nature of that recreation as it relates to Sunday leisure. This type of matter should be determined locally.

¹⁰ R.S.O. 1960, c. 158.

¹¹ S.O. 1961-62, c. 48, s. 86.

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. All recreational, entertainment and cultural facilities in Ontario should be permitted to operate on Sundays, subject only to municipal regulation or prohibition by bylaw.

2. The province should not limit these activities to any specific areas or prescribe any time of commencement or termination.

3. Any municipal bylaw providing for the regulation or prohibition of these activities by prescribing the time of commencement or termination or otherwise should be directed towards secular and not religious objects.

4. Where regional municipal governments are in existence, the regulatory and prohibitory powers over recreational, entertainment and cultural facilities should be delegated to the regional government unit and not to each municipal government within the region.

5. The regulation under *The Game and Fish Act* prohibiting Sunday hunting in various parts of the province should be repealed. Sunday hunting should be treated in the same manner as all other forms of recreation on that day, i.e., permitted unless regulated or prohibited by local bylaw.

CHAPTER 14

MANUFACTURING, PRODUCTION AND CONSTRUCTION ON SUNDAY

S U M M A R Y

A. GENERAL PROHIBITION

B. "ESSENTIAL" EXCEPTIONS BY REASON OF TECHNICAL OR ECONOMIC NECESSITY

1. Mining, Concentrating and Smelting
2. Petroleum Refining
3. Primary Steel Production
4. Pulp and Paper Production
5. Chemical Refining and Production
6. Commercial Fishing
7. Necessary Agricultural Activities

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL PROHIBITION

Consistent with our earlier proposals, there should be in Ontario a general prohibition of employing any person on Sunday in a manufacturing, production or construction enterprise run for a profit, except for certain clearly defined exceptions. The major concern here is not so much with preserving a "quality" Sunday environment (although this is important in some communities where the operation of particular industries greatly affects the total environment), but in reducing Sunday employment. Particularly in heavily industrialized communities, the institution of Sunday as a day free from work for the pursuit of leisure activities with family and friends would soon become eroded if all industries were permitted to operate seven days a week on a staggered "pause day per week" basis. While some employees might regard themselves as "protected" by virtue of premium rates for Sunday work guaranteed in their union contracts, there would be others not members of unions who would not have this protection. And indeed, as noted in Chapter 5, there are many industrial employees who would still prefer to have their Sundays off to spend with their family and friends, notwithstanding that they would be entitled to draw premium rates for Sunday work.

However, there are certain industries in the province which must operate continuously as a matter of technical necessity where it is physically impossible to interrupt the manufacturing production or construction processes involved. In recent years, the number and size of industries operating continuously as a matter of technical necessity have been increasing with the modernization of various industrial processes and the acquisition of new machinery designed to run twenty-four hours a day, seven days a week. We have no hesitation in proposing the exemption of any industries required to operate continuously purely as a technical matter.

But often the reasons put forward for continuous operation in some industries are not purely *technical*. Because of the high capital investment in new machinery and equipment by many manufacturing, production and construction industries, it is argued that there is a need to keep this machinery operating continuously as a matter of *economic* necessity—to ensure a fair return on capital investment and to maintain a competitive position in world and domestic markets for the products of these industries. In many of these industries it might be physically possible to shut down and start up the machinery once a week. But because of the economic disadvantages resulting from unfulfilled productive capacity and the difficulties of maintaining quality control, economic necessity for continuous operation in these industries gradually becomes so great that it tends to merge with technical necessity. To suggest that these industries acquire less or simpler machinery which will easily shut down and start up at weekly intervals is to advocate their virtual elimination from the Ontario economy unless of course their competitors in other jurisdictions are subject to the same conditions and restrictions.

Thus, as we noted in Chapter 5, there is a need to make specific exceptions from the general Sunday prohibition, related to both technical and economic necessity (without attempting to distinguish between the two determinants because of their close interrelation). The term “economic necessity” is, of course, incapable of any precise definition but it should be determined for each industry having regard to the economic health of the province as a whole and its relationship with other jurisdictions (both inside and outside Canada). This was the approach taken in 1966 by the Alleen Commission in Quebec in respect of the pulp and paper industry in that province, and we think it has much to commend it. Economic necessity should not be determined in the sense of “economic advantage” so as to give one industry in the province an advantage (by virtue of allowing Sunday operations) over another industry in the province, or one area of the province an advantage over another (in the absence of *technical* necessity). Also, future decisions in this area should be made having regard to the fact that men are not machines and that every class of industry permitted to operate Sundays as a matter of economic necessity means that most employees in that industry will likely be deprived of having the benefits of a common pause day together with their family and friends.

B. “ESSENTIAL” EXCEPTIONS BY REASON OF TECHNICAL OR ECONOMIC NECESSITY

On the basis of *technical* and/or *economic* necessity as applied to existing conditions in the province of Ontario (some of which were referred to in Chapter 5), we would propose that the following industries be exempted from the general Sunday prohibition:

1. mining, concentrating and smelting
2. petroleum refining
3. primary steel production
4. pulp and paper production

5. chemical refining and production
6. commercial fishing
7. necessary agricultural activities.

It should be noted that industries within the above seven classes need not run on a continuous basis to take advantage of the exemption. Particularly with commercial fishing and necessary agricultural activities, it would be more likely that their operations would involve just one shift a day seven days a week rather than three shifts a day.

In addition to the above industries which should be listed as specific exemptions in the legislation, we would propose that provision be made for such further classes of industries in the province as are designated by the Lieutenant-Governor in Council as continuous or seven-day operations according to the technical or economic determinants discussed above.

Since most of the industries within the above seven classes are now operating Sundays, the effect of the exemption provision will be simply to clarify their legal position which heretofore has been in some doubt under the federal *Lord's Day Act*. In the first five classes of industries listed, most employees would appear to be adequately protected by the premium rate provisions in their union contracts in Ontario. For example, when various pulp and paper companies in the province have moved from "six-day" to "seven-day" operation, not only have employees received premium rates for their Sunday work but they have received an across-the-board increase of 10-15c. per hour applying throughout the week as well. Employees engaged in commercial fishing and agricultural production traditionally have accepted occasional seasonal Sunday employment as a necessary condition of that line of work. Therefore, there would appear to be little need for regulation and containment of Sunday operation in the exempted industries other than by the limitations inherent in the specific wording of the seven classes.

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The Ontario scheme of Sunday laws should prohibit the employment of any person on Sunday in a manufacturing, production or construction enterprise run for a profit, except for certain clearly defined exceptions.

2. The exceptions from the prohibition in 1. should be determined by the need for continuous or seven-day production based on technical or economic necessity.

3. The following industries should be permitted to operate on Sundays: (1) mining, concentrating and smelting; (2) petroleum refining; (3) primary steel production; (4) pulp and paper production; (5) chemical refining and production; (6) commercial fishing; and (7) necessary agricultural activities.

4. Provision should be made in the legislation for such further excepted classes of industries as are designated by the Lieutenant-Governor in Council for reasons of technical or economic necessity.

CHAPTER 15

TOURIST AREAS

S U M M A R Y

A. GENERAL

B. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL

There are several parts of Ontario to which many tourists are attracted at various times of year for a variety of recreational purposes. We refer not only to summer resort communities such as those located in the Muskoka Lakes or in the far northwestern part of the province but also those communities which are centres of winter recreation such as Collingwood or centres of scenic interest such as Niagara Falls. It may well be that some of our proposals for general prohibitions of Sunday selling and Sunday commercial services, businesses and employment (with regulated exceptions) are inappropriate for these communities, or areas within these communities, at certain times of year.

It is our opinion that in tourist areas there should be permitted additional exemptions from the general Sunday prohibitions to accommodate high seasonal or geographically concentrated demands by tourists for goods and services related to recreational needs. We would therefore propose that such additional exemptions be determined by the provincial licensing body in such regions, townships and municipalities or parts thereof which are designated as "tourist areas" by the Lieutenant-Governor in Council.

In the selection of "tourist areas", it should be possible for the Lieutenant-Governor in Council to designate areas as large or as small as seem desirable at the time. Although it would be feasible administratively to designate areas conforming to regional, township or municipal boundaries, it might be necessary in some cases to designate only parts of regions, townships or municipalities. For example, the Greater Niagara Chamber of Commerce recommended that Sunday exemption licences be granted in that city only for those stores or business establishments providing goods or services primarily to members of the vacationing and travelling public, and that those stores or establishments providing goods and services primarily to local residents be subject to the same regulations as other non-tourist areas of the province. Within a city like Niagara Falls, or in other tourist communities, it should be possible to name certain specific areas which primarily serve the vacationing and travelling public and to designate them as "tourist areas". At the other end of the scale, it should be possible to name large areas such as the District of Muskoka as a "tourist area" for certain designated times of the year.

Within each tourist area so designated, the provincial licensing body should be empowered, upon application by one or more stores or business establishments within a class, to specify that all such stores, establishments or businesses within that class be allowed to open Sundays in that tourist area and the time each year when the exemption is to be in force.

The approval of such an application by the licensing body should be by means of an order pertaining to a particular class of store or business establishment in the tourist area under consideration, but only after it has convened a conference¹ to consider (1) the views of other stores or business establishments in the same class as the applicant in that tourist area; (2) the views of the regional, township and municipal councils in that tourist area; (3) the recreational, entertainment and cultural needs of the tourists in that area, having regard to the importance of the tourist industry to the economic well-being of that area; and (4) the views of employees in that class of store or business establishment for which the application is made. The licensing body should also be required to advertise its intention of making a tourist area exemption order before so doing, and should take into account any written objections received.

Each exemption order in an area should clearly specify the class of stores or business establishments permitted to open and the time of year for which it is applicable. In the interests of fairness among competitors, the exemption order should not be capable of being limited to particular sub-areas within the tourist area nor to specific stores or business establishments, nor should it be restricted as to the time of day (i.e., either specific times or maximum number of hours per day). All stores or business establishments coming within the class specified in the terms of the order should be entitled as of right to a Sunday licence for the time of year specified therein. The licensing body should be empowered to suspend or revoke the Sunday licence for those stores or business establishments which do not adhere to the terms of the exemption order recited in the licence.

The advantages of the above scheme are twofold. First, it provides that the tourist areas subjected to the scheme will be determined and defined by the Cabinet which is directly responsible to the electorate. Thus there is some degree of political control in the people as to what areas will have the advantages (or disadvantages) of this additional exemption scheme. Second, the scheme allows the licensing body within each tourist area a certain degree of flexibility in considering the classes of stores or business establishments to be exempted, and the time of year during which the exemption applies, but compels it to consider the views of all major interest groups and does not permit it to discriminate between

¹*The Industrial Standards Act*, R.S.O. 1960, c. 186, ss. 6-8; amended S.O. 1964, c. 46, ss. 4-6, contains procedures for the convening of a conference of employers and employees in a particular industry in a designated zone for the purpose of investigating and considering conditions of labour. Section 6(1) provides that "notice of the conference shall be given by publication thereof at least once in each of two consecutive weeks in a newspaper having general circulation in the zone for which the conference is to be held."

stores or business establishments within a class or between various sub-areas or communities within a designated tourist area. The licensing scheme is similar to one recommended in 1964 by the Crathorne Committee in England.² The provision for the designation of "tourist areas" by the Lieutenant-Governor in Council is similar to that contained in the *Commercial Establishments Business Hours Act*³ in Quebec.

As for the classes of stores or business establishments within a tourist area that might be necessary to accommodate the needs of tourists, the licensing body will have to consider existing conditions in each area. However, one might envisage applications by sporting goods stores, stores carrying photography equipment supplies, clothing shops carrying sun and beach apparel, boat and trailer dealers, snowmobile dealers, ski shops, souvenir and novelty shops (already proposed for an exemption under license on a province-wide basis, but with trade and price restrictions), bookshops, toy stores, certain types of food stores such as delicatessens, laundry and dry cleaning establishments, hair-dressers, and greenhouses and flower shops.

B. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The provincial licensing body should be empowered to grant additional exemptions from the Sunday prohibitions for any class of store or business establishment within any regions, townships or municipalities, or parts thereof, which are designated as "tourist areas" by the Lieutenant-Governor in Council.

2. Tourist area exemptions should be granted upon application by one or more stores or business establishments within a class, and should specify the class and the time of year. They should not be capable of being restricted to sub-areas within a tourist area nor to specific stores or business establishments, nor should they be restricted as to time of day.

3. Before granting a tourist area exemption, the licensing body should be required to convene a conference to consider: (1) the views of all other stores or business establishments in the class under review; (2) the views of the regional, township and municipal councils in the tourist area under review; (3) the recreational, entertainment and cultural needs of the tourists in the area, having regard to the importance of the tourist industry to the economic well-being of that area; and (4) the views of employees in that class of store or business establishment for which the application is made. The licensing body should also be required to advertise its intention of making a tourist area exemption order before so doing, and should take into account any written objections received.

²Report of the Departmental Committee on the Law of Sunday Observance, (1964; Cmnd. 2528) pp. 50-53.

³1969 S.Q., cc. 60, s. 5.

CHAPTER 16

SABBATARIAN EXEMPTION

S U M M A R Y

A. GENERAL

B. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL

During our public hearings, we were urged by representatives of the Canadian Jewish Congress, the Ontario-Quebec Conference of the Seventh-day Adventist Church, the Seventh-day Adventist Reformed Church (Eastern Canadian Conference) and the Ottawa Seventh-day Adventist Church (all of whom made separate submissions) to consider making an exception from Sunday observance laws for those persons who conscientiously observe Saturday or some other day as their religious day and to permit them to open their places of business on Sunday providing they close on Saturday or that other religious day. It was pointed out that the federal Parliament in 1906 had refused to include such a provision in the original *Lord's Day Act* and it was suggested that this was a form of economic discrimination against minority religious groups, since the choice of Sunday as the day of closing meant that the conscientious Jew or Seventh-day Adventist who observed Saturday had only a five-day business week while his Christian or agnostic competitors had six. They asked that members of their faith not be forced to choose between their religious convictions and their economic well-being in this manner.

It was drawn to our attention that the *Shops Act, 1950*¹ in England makes special provision for shop-keepers who observe the Jewish Sabbath whereby a person who conscientiously objects on religious grounds to trading on the Jewish Sabbath can be licensed to open on Sunday until 2 p.m. provided he in fact keeps his shop closed for all purposes on Saturday. Also, reference was made to the 25 states of the U.S.A. which have sabbatarian exemption clauses,² although in almost half of these the exemption does not extend to sales activity but only to Sunday labour.³

¹1950, 14 Geo. 6, c. 28, s. 53.

²Arkansas, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Maryland, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington and West Virginia.

³In Maine, Massachusetts, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Dakota, Texas, Washington and Connecticut the sabbatarian exemption does not cover the sale of goods. In Virginia and West Virginia, the exemption extends to selling, but an exempted person may not employ other persons not of his own belief on Sunday.

While there are significant practical difficulties⁴ that would have to be overcome in fashioning a sabbatarian exemption for inclusion in legislation, we could see merit in adopting such a proposal—if Ontario were to enact or continue the historic “anti-profanation of the Lord’s day” type of scheme based primarily on religious considerations. After all, in a country recognizing fundamental religious freedoms, state support for the divine Christian precept of the Lord’s day ought to be tempered by a toleration of minority religious tenets, provided that there is no substantial damage done to the basic religious principle involved. However, we would re-assert here one of our fundamental positions stated in Chapter 9—that the Sunday legislation which we consider appropriate for Ontario should be *secular* in both purpose and effect, and that religious considerations should *not* influence or determine specific provisions or the scope of the legislation in any way whatsoever. We have proceeded in all our proposals and alternatives made to this point on the basis that the maintenance of Sunday free from work for the pursuit of leisure activities of one’s own choosing *can* and *should* be placed in a secular framework. We would hardly be consistent with this approach by proposing a sabbatarian exemption allowing exceptions from the framework for those who would prefer, for *religious* reasons, to close their businesses on another day. To do so would be to clothe the legislation with the very religious character which we have deliberately sought to avoid.

We would deny that the legislative selection of Sunday as the uniform day of pause is incapable of an independent secular existence. And, consistent with this, we would not be in favour of special concessions granted to any religious group, Christian, Jewish or otherwise, insofar as they might derogate from the primary secular objectives outlined. For the province properly to enact a plenary legislative scheme in this field, the legislation *must* be secular as a constitutional matter, and the adoption of certain religious provisions such as a sabbatarian exemption would be to put the constitutional validity of such a scheme in jeopardy.

But even apart from this, a sabbatarian exemption might lead to certain problems in preserving Sunday as a day free from work for the pursuit of leisure activities with family and friends. For it well might give those sabbatarians who close their businesses Saturday and open Sunday a substantial competitive advantage over those required by law to follow the normal Sunday closing pattern, such as would trigger demands for wide-scale Sunday openings for reasons of economic

⁴For example, how is it to be determined whether a person *actually* observes a day other than Sunday for religious reasons? Are the benefits of a sabbatarian exemption to apply to natural persons only, or to corporations and partnerships as well, and if the latter, how is the “religion” of a corporation or partnership to be determined—by the religious affiliation of shareholders, or of the management, or of the officers, or of employees, or by the religious character of the business carried on? These problems are fully discussed, and alternative legislative provisions provided in the Report of the Special Committee Appointed By His Excellency John A. Volpe, Governor Of The Commonwealth, To Consider the Law Relative To Lord’s Day Observance (Massachusetts, Senate No. 404, 1962), at pp. 39-41; 61-64. Also, see “A State Statute to Provide For a Common Day of Rest” in (1966), 3 Harv. J. Legis. 345, at pp. 346; 350-354.

self-defence. Also, there would have to be some sort of protection for non-sabbatarian employees of sabbatarian employers who chose to open Sunday and close Saturday. These and other difficulties were discussed by Justice Frankfurter in *McGowan v. Maryland*⁵ in the United States Supreme Court in 1961 wherein he rejected the argument that Sunday closing of retail stores with no sabbatarian exemption violated the constitutional rights of Jewish retailers and customers to exercise and observe their religion under the "due process" clause of the fourteenth amendment. He noted:

There are tenable reasons why a legislature might choose not to make such an exception. To whatever extent persons who come within the exception are present in a community, their activity would disturb the atmosphere of general repose and reintroduce into Sunday the business tempos of the week. Administration would be more difficult, with violations less evident and, in effect, two or more days to police instead of one. If it is assumed that the retail demand for consumer items is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position, presumably, to complain of discrimination against *his* religion. *Employers who wished to avail themselves of the exception would have to employ only their co-religionists, and there might be introduced into private employment practices an element of religious differentiation which a legislature could regard as undesirable.* [emphasis added]⁶

Finally, a relevant consideration which might cause a State's lawmakers to reject exception for observers of another day than Sunday is that administration of such a provision may require judicial inquiry into religious belief.⁷

Chief Justice Warren in the companion case of *Braunfeld v. Brown*⁸ made many of the same points for himself, and Associate Justices Black, Clark and Whittaker:

... [T]hus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

⁵(1961), 366 U.S. 420.

⁶*The Ontario Human Rights Code*, S.O. 1961-62, c. 93, s. 4(1) provides:

No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ any person or discriminate against any person with regard to employment or any term or condition of employment because of his race, creed, colour, nationality, ancestry or place of origin.

Thus, the element of religious differentiation in private employment practices which Justice Frankfurter says a Legislature could regard as undesirable has actually been proscribed by law in Ontario since 1962.

⁷(1961), 366 U.S. 420, at pp. 515-516.

⁸(1961), 366 U.S. 599.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring.⁹

None of the other provinces in Canada has a sabbatarian exemption as part of its Sunday observance laws. Quebec originally had a limited exemption in its 1907 *Sunday Observance Act* for a person who "conscientiously and habitually observes the seventh day of the week as the Sabbath day, and actually abstains from work on that day", in which case he would be permitted to work on Sunday as long as he did not "disturb other persons in the observance of the first day of the week as a holy day" and "the place where such work was done [was] not open for trade on that day".¹⁰ However, the section was repealed by the 1941 statute revision in that province.¹¹

In summary, we would not be in favour of a sabbatarian exemption as part of the legislative scheme outlined in this and the preceding chapter for three reasons: (1) it would be inconsistent with the secular objectives we have proposed; (2) it would jeopardize the constitutional validity of the scheme; and (3) it would create practical difficulties of administration and enforcement as articulated by Associate Justice Frankfurter and Chief Justice Warren.

B. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The Ontario scheme of secular Sunday laws should not contain a sabbatarian exemption clause.

⁹*Ibid.*, pp. 608-609.

¹⁰1907, 7 Edw. 7, c. 42, s. 6.

¹¹R.S.Q. 1941, c. 309.

CHAPTER 17

ENFORCEMENT OF SUNDAY LEGISLATION

S U M M A R Y

- A. PROSECUTORY DISCRETION
- B. OFFENCES AND PENALTIES
- C. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. PROSECUTORY DISCRETION

Section 16 of the federal *Lord's Day Act* gives the Attorney General or his deputy in each province a discretion as to whether a prosecution for a violation of that Act shall be commenced. This section was included by Parliament in the original *Lord's Day Act* in 1906 to prevent the Act from being used as an instrument of persecution and harassment. As noted in Chapter 8, it has been interpreted by the Courts as intended to prevent indiscriminate private prosecutions.

In Ontario in recent years, the discretion has been exercised in such a way as to deny consent to prosecute in a variety of cases, including Jewish bakery shops,¹ summer resorts,² and small shops of

¹The Canadian Jewish Congress (Central Region) stated in their brief presented at the public hearings in Toronto on April 29, 1970:

In the early 1950's the then Attorney-General of Ontario let it be known that bakery shops which were closed on the Jewish Sabbath would not be prosecuted if they kept open on Sundays. This arrangement has functioned successfully for more than 15 years in the Toronto area without once creating disruption or problems.

²In the Legislature of Ontario, Debates of March 21, 1950, at pp. A 10-A 11; B. 1, the Hon. Dana Porter, Attorney-General for Ontario, made the following comments respecting section 16 of the federal *Lord's Day Act*:

... [N]o prosecution might be brought under this Act except with the consent of the Attorney General of that province.

It is a somewhat embarrassing situation to deal with, especially in the summer months.

And it may be of interest to the hon. members to know that during the last summer season, when a great deal of commercial amusements are in operation in different places, in different tourists resorts of one kind and another, in order to bring some regularity to the practice in the hon. Attorney General's Department, a memorandum was prepared with instructions to crown attorneys throughout the province, and to municipal councils in which a clear line was drawn as between the things which could be done and would be considered quite properly done, in view of the provisions of this Act, and the sort of things which would be regarded as offences against the Act, and for which consents to prosecute would be given.

I think the experience following the issuance of that memorandum last summer was very satisfactory, because the department and myself took the position in all cases where there were any offences under the Act, which were clearly stated to be those which would be prosecuted by the memorandum issued, consents were given in every case; there were no exceptions made.

And the people involved in these activities and amusements throughout the province know where they stand. . . .

the milk store variety.³ Also, the Attorney General for Ontario stated in the Legislature in 1969 that he would use his discretion respecting enforcement in response to public demand and opinion in various areas of the province.⁴

We have already discussed in Chapter 6 the attitude of the public expressed at our public hearings respecting the existence of the discretion and the manner of its exercise. The preponderance of those addressing themselves to the question were not in favour of it, preferring to see it completely abolished or limited to clear cases of persecution and harassment. Concern was expressed that it permitted selective or unequal enforcement of the law, and was therefore discriminatory. Those appearing at the public hearings who were in favour of the retention of the discretion generally based their position on the practical flexibility of enforcement which it permitted, particularly since the Act was of the type giving rise to many technical and harmless violations.

We have proposed a separate provincial legislative scheme respecting Sunday independent of the federal *Lord's Day Act* so far as it is possible constitutionally. Therefore the matter of the prosecutory discretion contained in that federal Act is not directly relevant to our proposals except for the question of whether a similar provision should be included in our separate provincial scheme which is on a secular basis.

However, before considering this question, we feel constrained to comment on section 16. It is our opinion that the prosecutory discretion contained in this section has no place in any law which is to be respected by the public. It is a singularly unique provision in Canadian law under which one level of government prohibits certain activities and the principal law officer of the other level has a virtually unfettered discretion as to whether those general prohibitions can be enforced. As such, it is capable of being exercised in a selective and arbitrary manner inconsistent with established notions of the rule of law, with the only checks being the good faith of the provincial Attorneys General and any public statements of policy which they might care to make. Indeed, the section permits a provincial Attorney General to vitiate unilaterally the effect of this federal criminal statute in his particular province.

The prosecutory discretion and the system of selective enforcement which it permits have often been justified on the basis of differences in public opinion in various parts of the province. Implicit in this is a recognition of the controversial nature of the prohibitions in the

Then, on October 1, 1969 in the Legislature, the Hon. J. P. Robarts, Prime Minister of Ontario, replied to a question concerning the government's policy respecting prosecution to the effect that it would not be applied to summer resorts. See Legislature of Ontario, Debates, 1969, at pp. 6485-6486.

³See the statement of the Hon. Mr. Robarts on October 1, 1969, in Legislature of Ontario, Debates, 1969, at pp. 6485 and 7325; also the statements of the Hon. Mr. Wishart, Attorney General for Ontario, on October 21, 1969, in Legislature of Ontario, Debates, 1969, pp. 7331-7332.

⁴Hon. Mr. Wishart, *ibid.*

Act and therefore a policy of leniency, except where there are sufficient complaints from an area to warrant prosecution. The dangers of such a policy were discussed by Professor Kenneth Culp Davis of the University of Chicago Law School in his recent book *Discretionary Justice: A Preliminary Inquiry*:

In any system of selective enforcement one of the most frequent reasons for refraining from enforcement is leniency. . . . The discretionary power to be lenient has a deceptive quality that is dangerous to justice.

A fundamental fact about the discretionary power to be lenient is extremely simple and entirely clear and yet is usually overlooked: *The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate. . . .*

The widespread belief among judges, legislators, administrators, and lawyers that discretionary power to be lenient need not be protected against abuse rests on the supposition that withholding enforcement cannot hurt anyone. The supposition is unsound, both logically and practically. Logically, discretionary power to favor an individual cannot exist without discretionary power not to favor him. Practically, discretionary power to favor one individual means power to discriminate, power to refuse evenhanded justice.⁵

While this discretionary power of enforcement remains with the provincial Attorneys General, it must be remembered that it is the federal Parliament which directly controls the substantive prohibitions in the *Lord's Day Act*. If these federal prohibitions are no longer appropriate for the majority of the people in Canada today, then surely they should be amended or repealed by Parliament rather than relying on the mitigating leniency of the provincial Attorneys General through selective enforcement.

The argument that section 16 is necessary to prevent the federal *Lord's Day Act* from becoming an instrument of persecution and harassment would also seem to bespeak the very inappropriateness of that Act as a criminal statute of general application throughout the country. In any event, a person who felt he was being persecuted as a result of indiscriminate private prosecutions under the Act would always have a civil remedy in an action for malicious prosecution. Moreover, an over-zealous citizen initiating such indiscriminate prosecutions would unlikely gain the support of the law officers of the Crown and would have to carry the burden of proving the criminal offence in court by himself or through his own counsel.

It follows then that we would not favour the inclusion of the type of unfettered prosecutory discretion as in section 16 of the federal Act in the plenary provincial legislative scheme of Sunday regulation which we have proposed in this and the preceding chapter. Secular Sunday laws in the province should not be subject to the

⁵Davis, *Discretionary Justice: A Preliminary Inquiry* (1969), pp. 170, 172.

type of selective enforcement which has characterized the federal *Lord's Day Act* in recent years. Instead, the provincial legislation should contain specific standards or criteria such as we have proposed in previous chapters for various types of stores and business establishments. If a licensing body is established, as we have proposed, it should be required to work within these standards and to exercise any narrow discretion which it might be given according to objective policy considerations clearly articulated in the legislation.⁶ Given this type of provincial legislation which is on a secular basis, we can see no objection to allowing prosecutions for violations proceeding on the same basis as for any other provincial legislation creating offences for violations of its substantive provisions. *The Highway Traffic Act*,⁷ *The Construction Safety Act*,⁸ *The Department of Labour Act*,⁹ and *The One Day's Rest in Seven Act*¹⁰ are but examples of many provincial Acts in Ontario containing provisions for summary conviction offences unfettered by the requirement of the consent of the Attorney General or his deputy before a prosecution may be brought.

B. OFFENCES AND PENALTIES

Fines under the federal *Lord's Day Act* have been unchanged since it was first enacted in 1906: a maximum of \$40 and a minimum of \$1 for each offence by an individual (together with the cost of prosecution); a maximum of \$100 and a minimum of \$20 for each offence by an employer authorizing or directing a violation; and a maximum of \$250 and a minimum of \$50 for each offence by a corporation authorizing, directing or permitting a violation by its employees, with these corporation fines doubled for each subsequent offence.¹¹ These fines have been frequently criticized in recent years as being too low, in many instances being regarded by the offender as a mere licence fee as a cost of doing business on Sunday.

If a separate Sunday legislative scheme is to be adopted in this province as we have suggested, then we would propose that it include a more realistic level of maximum fines so as to provide an effective deterrent against flagrant and continued violations. Therefore we would propose that the maximum fines be set at \$100 for individuals and \$1,000 for corporations on first offence; and \$250 for individuals and \$2,500 for corporations on second and subsequent offences. There is no necessity for providing for minimum fines.

Violations of all prohibitions under the provincial legislative scheme of Sunday laws, including Sunday operation of a store or business establishment of the type requiring a Sunday licence without that licence, should on summary conviction be subject to fines up to these maximums.

⁶See the recommendations of the Royal Commission Inquiry into Civil Rights (Ontario), Report No. 1, Volume 3, pp. 1104-1107.

⁷R.S.O. 1960, c. 172.

⁸S.O. 1961-62, c. 18.

⁹R.S.O. 1960, c. 97.

¹⁰R.S.O. 1960, c. 269.

¹¹R.S.C. 1952, c. 171, ss. 12-14.

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The Ontario scheme of Sunday laws should not include the type of prosecutory discretion contained in section 16 of the federal *Lord's Day Act*. Instead, prosecutions for violations of the legislation should proceed on the same basis as for any other provincial legislation creating offences for violations of its substantive provisions, i.e., without requiring the consent of the Attorney General or his Deputy.

2. Maximum fines for offences under the Ontario scheme of Sunday laws should be set at \$100 for individuals and \$1,000 for corporations on first offence; and \$250 for individuals and \$2,500 for corporations on second and subsequent offences.

CHAPTER 18

LABOUR STANDARDS RELATED TO SUNDAY

S U M M A R Y

- A. THE ONE DAY'S REST IN SEVEN ACT
- B. PREMIUM RATES FOR SUNDAY WORK
- C. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. THE ONE DAY'S REST IN SEVEN ACT

This legislation, first enacted in Ontario in 1922, requires every hotel, restaurant or café employer in communities of 10,000 population or more to allow his employees (excluding watchmen, janitors, superintendents, foremen and employees working less than five hours per day) twenty-four consecutive hours of rest in every seven days, wherever possible on a Sunday. The penalty for violation of the Act by an employer is a fine of up to \$100. The purpose of this Act, as stated on its enactment,¹ was to promote the public health. It was a response of the Ontario government of the day to the *Weekly Rest (Industry) Convention, 1921*² adopted by the newly formed International Labour Organization in Geneva, Switzerland.

We consider this legislation today to be consistent with the type of secular Sunday scheme we have proposed. Indeed, we are of the view that it should be expanded to cover *all* employers in the province, not just those employers operating hotels, restaurants and cafés. Moreover, it should extend to all parts of the province, not just to communities of 10,000 population or more.

In this age of the forty hour/five-day work week in most parts of the western world, the minimum standard of one day's rest in seven for all workers is surely one that would be readily accepted by practically everyone in this province.

These extensions of the Act to make it one of universal application throughout the province would constitute virtually absolute compliance with the International Labour Organization's *Weekly Rest (Industry) Convention, 1921* and *Weekly Rest (Commerce and Offices) Convention, 1957*,³

¹Microfilm of Toronto Globe and Mail, May 26, 1922 carrying unofficial report of the previous day's Legislative Debates. The Act became law on June 13, 1922 and came into force on August 1, 1922.

²This Convention was ratified by the Dominion of Canada on March 1, 1935. The federal legislation purporting to implement it, the *Weekly Rest in Industrial Undertakings Act*, S.C. 1935-36, c. 14, was declared *ultra vires* by the Judicial Committee of the Privy Council in the *Labour Conventions* case, [1937] A.C. 326.

³This Convention has not been ratified by Canada. A Recommendation accompanying this 1957 Convention urges that the rest period should be at least 36 hours, which, wherever practicable, should be an uninterrupted period. Also, it is urged that young persons under 18 years of age should, wherever practicable, be granted an uninterrupted weekly rest of two days (cited as *Weekly Rest (Commerce and Offices) Recommendation, 1957*).

and is directly related to the maintenance of the physiological and psychological well-being of working persons and their pursuit of leisure activities and enjoyment of life.

It would be necessary, of course, to make provision for some employers to be exempt from the above requirement in specific cases or at certain times of year. This is recognized in the two Conventions above.⁴ The exempting function could be performed by the provincial licensing body referred to in previous chapters, which could determine on the basis of humanitarian, economic, emergency or seasonal considerations the industries or businesses (individually or by class) requiring an exemption and the period for which such exemption could apply. Before making an exemption order for a particular employer or class of employers, the licensing body should be required to consult the employees to be affected, either through their union or individually, and also all employers (other than those making application for an exemption) to be affected by the order. Provision should be made for public hearings where necessary.

All such exemption orders issued by the licensing body should require exempted employers to provide employees with compensatory time off of a total duration at least equivalent to twenty-four hours in every seven days. Thus, a person working in units of twelve straight days would be entitled to a minimum of forty-eight hours off for every such unit worked.

We would not expect that many industries or businesses would find it necessary to apply for an exemption order, since the five- or six-day work week is fairly standard, even among those industries or businesses operating continuously or with rotating shifts. Those that do extend the work week to longer than six days (e.g., some employers in the transportation and petroleum refining industries) are usually more than

⁴Articles 4 and 5 of the *Weekly Rest (Industry) Convention, 1921* provide:

Article 4

1. Each Member may authorise total or partial exceptions (including suspensions or diminutions) from the provisions of Article 2, special regard being had to all proper humanitarian and economic considerations and after consultation with responsible associations of employers and workers, wherever such exist.
2. Such consultation shall not be necessary in the case of exceptions which have already been made under existing legislation.

Article 5

Each Member shall make, as far as possible, provision for compensatory periods of rest for the suspensions or diminutions made in virtue of Article 4, except in cases where agreements or customs already provide for such periods.

Articles 7 and 8 of the *Weekly Rest (Commerce and Offices) Convention, 1957* provide:

Article 7

1. Where the nature of the work, the nature of the service performed by the establishment, the size of the population to be served, or the number of persons employed is such that the provisions of Article 6 cannot be applied, measures may be taken by the competent authority or through the appropriate machinery in each country to apply special weekly rest schemes, where appropriate, to specified categories of persons or specified types of establishments covered by this Convention, regard being paid to all proper social and economic considerations.

generous in granting compensatory time off, and there is little if any probability of hardship being inflicted as a result of our proposal above.

The phrase "... wherever possible such twenty-four consecutive hours shall be on a Sunday" found in the present Act is of no consequence as an effective legal sanction because of the contingent manner in which it is expressed. However, we consider the phrase to be a useful one as a form of hortative declaration serving as a reminder to employers of the special place which a Sunday pause day has in the life and leisure of most working men. We would therefore propose that it be retained.

Finally, we would propose that *The One Day's Rest in Seven Act*, extended and modified as proposed above, be brought into and integrated with the legislative scheme for Sunday which we have proposed in this and the preceding chapter, so as to reflect more clearly our objective of preserving one day free from work for the pursuit of leisure activities of one's own choosing. The major benefit of the "one day's rest in seven requirement", as a supplement to our earlier Sunday proposals, would be to serve as a remedial check on those industries and businesses which are specifically exempted from Sunday closing provisions.

Alternatively, it might be considered desirable to integrate *The One Day's Rest in Seven Act*, extended and modified as proposed, with

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2. All persons to whom such special schemes apply shall be entitled, in respect of each period of seven days, to rest of a total duration at least equivalent to the period provided for in Article 6.
 3. Persons working in branches of establishments subject to special schemes, which branches would, if independent, be subject to the provisions of Article 6, shall be subject to the provisions of that Article.
 4. Any measures regarding the application of the provisions of paragraphs 1, 2 and 3 of this Article shall be taken in consultation with the representative employers' and workers' organisations concerned, where such exist.

Article 8

1. Temporary exemptions, total or partial (including the suspension or reduction of the rest period), from the provisions of Articles 6 and 7 may be granted in each country by the competent authority or in any other manner approved by the competent authority which is consistent with national law and practice—
 - (a) in case of accident, actual or threatened, *force majeure* or urgent work to premises and equipment, but only so far as may be necessary to avoid serious interference with the ordinary working of the establishment;
 - (b) in the event of abnormal pressure of work due to special circumstances, in so far as the employer cannot ordinarily be expected to resort to other measures;
 - (c) in order to prevent the loss of perishable goods.
2. In determining the circumstances in which temporary exemptions may be granted in accordance with the provisions of subparagraphs (b) and (c) of the preceding paragraph, the representative employers' and workers' organisations concerned, where such exist, shall be consulted.
3. Where temporary exemptions are made in accordance with the provisions of this Article, the persons concerned shall be granted compensatory rest of a total duration at least equivalent to the period provided for under Article 6.

*The Employment Standards Act*⁵ which deals with all aspects of employment, including maximum daily and weekly hours of work, overtime hours and rates of pay, minimum wages, equal pay for equal work, vacations with pay, homeworkers, and wage protection. In this case, *The Employment Standards Act* should then be cross-referenced with the legislative scheme respecting Sunday.

B. PREMIUM RATES FOR SUNDAY WORK

During the course of our public hearings, it was suggested to us that our objectives respecting Sunday might be most easily attained merely by amending *The Employment Standards Act* to provide compulsory double time rates for all work performed on Sunday, with no other regulatory provisions required. While this proposal might be attractive to some persons from an administrative and philosophical point of view, we have no hesitation in asserting that it would be incapable by itself of achieving the objectives sought. Particularly with Sunday retailing, the requirement of double time rates would provide very little deterrent respecting decisions to open because increased costs could easily be passed on to consumers and competition in the market-place would soon force many reluctant retailers to open out of economic self-defence.

The major question for us, therefore, was whether a "double time rates for Sunday work" requirement might be adopted in *The Employment Standards Act* as *supplementary* to our general legislative scheme of Sunday prohibitions, regulations and permissions, so as to further ensure that Sunday was preserved, *wherever possible*, as a day free from work for the pursuit of leisure activities of one's own choosing.

After considerable deliberation, we rejected this proposal for three reasons. First, it is our view that it would indirectly impose undue hardship on marginal or temporary employees in the province by forcing certain employers to curtail marginal or short-term jobs when faced with the prospect of having to pay double time rates on Sunday. Minimum hourly wage rates are set by regulation for most employees under *The Employment Standards Act*,⁶ and the general minimum as of October 1, 1970 was \$1.50 per hour which will be increased to \$1.65 per hour on April 1, 1971, with slightly lower amounts for certain types of casual or temporary labour.⁷ This would mean that after April 1, 1971 a minimum hourly rate of \$3.30 would have to be paid if the double time proposal were to be adopted.

⁵S.O. 1968, c. 35.

⁶*Ibid.*, O. Reg. 404/70.

⁷*Ibid.* The minimum wage rates established thereby include the following:

	Oct. 1, 1970	April 1, 1971
General.....	\$1.50	\$1.65
Learner (first month of employment)	1.40	1.55
Student (less than 28 hours per week, or summer, Christmas or Easter holidays).....	1.15	1.30
Under age 18: messenger boys, delivery boys, news vendors, pin setters, shoe shine boys, caddies, library employees, or employees in an amusement or refreshment booth at a fair or exhibition.....	1.10	1.25

The second reason for rejecting this proposal is the depressing effect it would have on the Sunday operations of many recreational, entertainment and cultural facilities in the province. If Sunday is to be preserved as a day for the pursuit of leisure activities of one's own choosing, financial impediments should not be placed in the path of the operation of leisure facilities of all types if we want to ensure that a choice of leisure activities is in fact available. This of course assumes that employees in recreational, entertainment and cultural facilities would be entitled to at least one day off in every seven, and wherever possible, on a Sunday.

The third and most important reason is that the proposal for double time rates would create significant problems in industries and businesses which by their very nature are required to operate regularly or seasonally on Sunday. Whether it be continuous process industries, transportation or communication industries, hospitals or agricultural production (all of which are merely examples), a universal requirement of premium rates for Sunday work would be an additional burden on and an unjustifiable interference with the usual practices and collective bargaining processes which have developed over the years in those industries and businesses where Sunday work cannot be avoided.

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. *The One Day's Rest in Seven Act* should be expanded to cover all employers in all parts of the province, not just those employers operating hotels, restaurants and cafés in communities of 10,000 population or more.

2. Exemptions from the minimum one day's rest in seven requirement should be permitted by the licensing body for individual or classes of industries or businesses on the basis of humanitarian, economic, emergency or seasonal considerations. Before making an exemption order, the licensing body should be required to consult the employees to be affected, either through their union or individually, and also other employers to be affected. Provision should be made for public hearings where necessary.

3. All exemption orders issued by the licensing body should require exempted employers to provide employees with compensatory time off of a total duration at least equivalent to twenty-four hours in every seven days.

4. *The One Day's Rest in Seven Act*, expanded and modified as proposed above, should be brought into and integrated with the legislative scheme for Sunday which we have proposed. Alternatively, it should be integrated with *The Employment Standards Act*, which should then be cross-referenced with the legislative scheme for Sunday.

5. Neither the Ontario scheme of Sunday laws nor *The Employment Standards Act* should include a requirement of premium rates for Sunday work.

CHAPTER 19

RELATED LEGAL PROBLEMS

S U M M A R Y

- A. CONTRACTS MADE ON SUNDAY
- B. LEGAL AND ADMINISTRATIVE PROCEEDINGS ON SUNDAY
- C. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. CONTRACTS MADE ON SUNDAY

As noted in Chapter 8, the Courts have held that a party cannot sue upon a contract which he has made in violation of a Sunday observance statute.¹ At common law, a contract made on Sunday is valid.² Certainly any contract that involves a transaction specifically exempted from the general prohibitions in a Sunday observance statute would be valid.³ It is unlikely that the Courts would permit a person to avoid a contract made on Sunday merely by pleading his own violation of a Sunday observance statute⁴ unless the plaintiff was also aware of the violation.⁵

During the public hearings, we asked a number of persons submitting briefs whether contracts made on Sunday should be enforceable. While a preponderance of replies were in the affirmative, a major concern appeared to be the avoidance of any rule which would allow a person to escape from an otherwise valid contract on a technical ground unrelated to the substance of the bargain made. The persons making this argument were often unable or unwilling to associate the making of the contract with the notion of illegal conduct (i.e., the violation of a Sunday observance statute) on the part of one of the parties to the contract (generally, the vendor). Those other persons who favoured Sunday contracts being treated as unenforceable saw such a rule as an additional means of curtailing commercial activity on Sunday.

In our view, the question of enforceability of Sunday contracts cannot be divorced from the broader question of the type of Sunday regulation that is deemed appropriate through legislation at any given time. If, for example, it is considered desirable to prohibit certain forms of selling on Sunday, the law, to be consistent, could hardly countenance the deliberate violation of that prohibition

¹ *Fennell v. Ridler* (1826), 5 B.&C. 406; *Superior Motors Limited v. Cade*, [1930] 3 D.L.R. 1003 (Sask. C.A.); *Ciz v. Hauka* (1953), 108 C.C.C. 349 (Man. Q.B.); *Angevaare v. McKay* (1960), 25 D.L.R. (2d) 521 (Ont. Co. Ct.); *Perry v. Anderson* (1970), 12 D.L.R. (3d) 414 (B.C.S.C.).

² *Drury v. Defontaine* (1808), 1 Taunt. 131; *Swann v. Broome* (1764), 3 Burr. 1595; and *Rex v. Walden* (1914), 6 W.W.R. 850 (B.C.C.A.).

³ *Memramcook Transport Ltd. v. Irving Oil Co. Ltd.* (1959), 25 D.L.R. (2d) 120 (N.B.C.A.).

⁴ *Bloxsome v. Williams* (1824), 3 B.&C. 232.

⁵ *Smith v. Sparrow* (1827), 4 Bing. 84.

by rendering valid a bargain which was a direct consequence of that illegal act. To do otherwise would be to invite widespread participation in the very conduct considered undesirable. On the other hand, selling or other types of activity not considered undesirable on Sunday by the scheme of Sunday regulation in force would not give rise to this problem, and any bargains made as a result thereof would be as enforceable as those made on other days of the week. Even where a bargain was made in violation of the scheme of Sunday regulation, the only person entitled to extricate himself from the bargain would be the innocent party who had not participated in the illegal conduct.

It may be that cases of apparent hardship have resulted from the application of the general rule relating to the enforceability of illegal contracts. However we would suggest that the hardship is not because of this rule relating to contracts, but because of the inappropriateness of many of the prohibitions in the very statute giving rise to the illegality in the first instance. Simply put, the broader the prohibitions are on Sunday, the wider the range of unenforceable Sunday contracts. But if the Sunday prohibitions are narrowed, then the range of unenforceable Sunday contracts will be reduced.

In Canada since 1906, most of the Sunday contract cases⁶ in which the Courts have held contracts to be unenforceable have involved violations of section 4 of the federal *Lord's Day Act*. It will be recalled that this is an all-embracing provision enacted primarily for religious purposes:

4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

However, with the adoption of the plenary secular scheme of Sunday regulation which we have proposed for Ontario, the question of illegality of Sunday contracts would be judicially determined by reference to the activities prohibited or permitted in this provincial scheme. We consider our secular provincial scheme proposed for Ontario as a more appropriate and viable form of Sunday regulation for now and in the future than the scheme under the federal *Lord's Day Act*. It follows that the limitation on the making of

⁶A few cases have involved specific provisions in provincial legislation rendering Sunday contracts void, but none of these is relevant to Ontario. See *Neider v. Carda of Peace River District Limited* (Supreme Court of Alberta, Jan. 23, 1970, unreported) in which a contract for the sale of land made on Sunday was declared null and void by virtue of *The Land Titles Act*, R.S.A. 1955, c.170, s.67. See also *The Sale of Goods Act*, R.S.A. 1955, c.295, s.5. An earlier case involving a since-repealed section of a Saskatchewan Lord's day statute was *Schuman v. Drab* (1919), 49 D.L.R. 57 (Sask. C.A.).

contracts on Sunday which our scheme would impose would be more appropriate and viable.

We would not be in favour of any legislative interference with the general rule followed by the Courts, that an illegal contract is unenforceable. We consider the equitable application of this rule to be an additional policing method by which participation in those commercial activities which are detrimental to the secular pause day objectives stated in Chapter 9 will be discouraged. Thus, persons who engage in the prohibited commercial activities on Sunday in violation of the law will risk not only the possibility of a fine or a licence revocation but will be unable to enlist the aid of the Courts to enforce the bargains they make while carrying on this illegal activity.

Therefore, we would not propose any specific change in the law in respect of contracts made on Sunday. Instead we would leave the Courts to determine these matters under the plenary secular scheme proposed earlier, in accordance with the general rules relating to illegal contracts.

B. LEGAL AND ADMINISTRATIVE PROCEEDINGS ON SUNDAY

Issues as to the legality of legal and administrative proceedings conducted on Sunday were not raised at the public hearings. However, the legal rules and practices in this area traditionally have been considered as part of the law of Sunday observance in Canada,⁷ so we considered it appropriate to address ourselves briefly to these issues within the broad framework permitted by our terms of reference.

In Chapter 8, we reviewed the existing law. Briefly stated, Sunday has always been regarded as a *dies non juridicus* (i.e., a day on which no judicial act ought to be done). The Courts have seldom been willing to depart from this common law rule, having declared to be a nullity both a coroner's inquest⁸ and a preliminary inquiry held on a Sunday.⁹ Only in instances where legal proceedings might be deemed "a work of necessity or mercy" would they be permitted on Sunday.

Consistent with the above, section 126 of *The Judicature Act*¹⁰ in Ontario prohibits and declares void the service or execution of any legal process "except in cases of treason, felony or breach of the peace". However, section 20 of the *Criminal Code* specifically validates a criminal warrant, summons or bail order made on a Sunday, and section 561 validates the taking of a criminal jury verdict on Sunday. Most Court offices are required by statute to be closed Sundays, Saturdays and holidays (see Chapter 8).

⁷See Holmested, *Sunday Laws in Canada* (1912), pp. 34-65.

⁸*R. v. Cooper* (1870), 5 P.R. 256.

⁹*R. v. Murray* (1897), 28 O.R. 549 (C.A.); *R. v. Cavalier* (1896), 1 C.C.C. 134 (Man.).

¹⁰R.S.O. 1960, c. 197.

As to whether administrative tribunals can perform their functions on Sunday, the law in Ontario has been clarified by the decision of the Ontario Court of Appeal in 1960 in the *Hirsch* case¹¹ wherein it was held that the *dies non juridicus* rule does not apply to administrative tribunals even when they are required to act judicially in the performance of their functions. Thus, an administrative tribunal can conduct its proceedings and issue its form of process on Sunday in the absence of specific statutory provisions to the contrary.

We have not been able to conceive of any particular hardships caused by the continuation of these legal rules and practices in the context of our earlier proposals. It would appear that a Court or judge could function on Sunday if an emergency situation demanded it. Under the portion of our secular scheme proposed in Chapter 12, these judicial functions could be validated under the term "services to protect persons or property in danger of injury or destruction". Administrative tribunals could function on Sunday where considered necessary, subject only to the general prohibition of employment of labour, but with the saving exception of "services to protect persons or property in danger of injury or destruction".

While the early origins of the *dies non juridicus* rule would be as much religious as humanitarian in nature, its practical application by the Courts today (with the emergency exception suggested) would seem to be consistent with the purely secular purposes we have proposed for Ontario legislation. Therefore, we would not propose any substantive change in this common law rule.

Neither would we propose changes in any of the statutory provisions relating to legal proceedings and process on Sunday, with the single exception of section 126 of *The Judicature Act* in which the term "Lord's Day" should be amended to read "Sunday".

C. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The validity of contracts made on Sunday should be determined by the Courts in accordance with the general rules relating to illegal contracts. Therefore, if a contract is made on Sunday in violation of a Sunday observance law, it should continue to be unenforceable.

2. There should be no changes in the common law rule invalidating Court proceedings on Sunday. Similarly, there should be no change in section 126 of *The Judicature Act* which invalidates the service or execution on Sunday of any legal process.

3. The term "Lord's Day" in section 126 of *The Judicature Act* should be amended to read "Sunday".

¹¹ *Attorney General for Canada v. Hirsch* (1960), 44 D.L.R. (2d) 93.

CHAPTER 20

ADMINISTRATION OF SUNDAY LEGISLATION BY THE DEPARTMENT OF LABOUR

S U M M A R Y

A. GENERAL

B. SUMMARY OF PROPOSALS AND ALTERNATIVES

A. GENERAL

The secular scheme of Sunday legislation which we have proposed for Ontario will require administrative machinery to deal with such matters as periodic inspection, employee complaints, dissemination of information, Sunday licence applications, and enforcement through prosecution. In our view, this administration could more effectively be provided by the Department of Labour as it is now constituted. This Department has an Employment Standards Branch complete with interpretation specialists qualified to administer employment and industrial standards, field service personnel, and regional managers, all of whom are equipped to secure the effective administration and enforcement of *The Employment Standards Act*¹ and *The Industrial Standards Act*² on a province-wide basis. The Department also has a Research Branch and several safety and technical service branches relating to various types of employment throughout the province.

This proposal is not in any way to be construed as a criticism of the administration of *The Lord's Day (Ontario) Act* by the Department of Justice, or section 16 of the federal *Lord's Day Act* by the Attorney General or his Deputy. Rather, it is a further indication of our desire to have the new legislative scheme which we have proposed administered by the department of government which most clearly reflects the intended purpose of the legislation.

We have proposed a legislative scheme which is secular in both purpose and effect—to preserve a quality environment in which the majority of Ontario residents will have one day free from work for the pursuit of leisure activities with family and friends. The present responsibilities of the Department of Labour are more akin to this desired purpose and effect than those of the Department of Justice and the Attorney General whose traditional roles in respect of Sunday observance have been part of the administration of criminal law in the province. We have attempted to avoid as far as possible the characterization of the proposed scheme as criminal law.

In addition, it is our view that the licensing body for the application of standards of regulation and containment for the Sunday operation of certain types of stores and business establishments should be responsible to the Minister of Labour. We would not be in favour

¹S.O. 1968, c. 35.

²R.S.O. 1960, c. 186; amended S.O. 1964, c. 46.

of making the Attorney General responsible for such a licensing body because the licensing and investigative functions of that body might well create a conflict with the Attorney General's traditional function as the Queen's Attorney responsible for prosecutions for violations of legislation. In this situation, the Attorney General might be required to prosecute individuals for carrying on Sunday business operations without the requisite licence, notwithstanding that the same individuals have already been disciplined by the licensing body for which he is responsible.³

Another important consideration is that the Department of Labour is now functionally equipped to disseminate employment information to all parts of the province on matters such as minimum wage rates, vacations with pay, maximum daily and weekly working hours, minimum premium rate requirements for overtime or holiday work, equal pay for equal work, etc. The Director of Employment Standards has certain powers under *The Employment Standards Act*⁴ to require information and compel the keeping and production of records, or to inspect, which powers are akin to those which would be required for the effective enforcement of the Sunday scheme proposed (e.g., such as the filing requirement for certain "essential" stores and establishments in selecting the consecutive six hour period they will open each Sunday, as discussed in Chapter 12). Also, an industrial standards officer under *The Industrial Standards Act*⁵ may convene a conference of employers and employees in certain industries such as barbering in a designated zone to negotiate labour conditions for the industry, including the days of the week when work is permitted. This function is not dissimilar to that which would be performed by the licensing body in the administration of the rotational system we have proposed for gasoline service stations and drug stores.

With all their present functions in the field of employment standards, the Department of Labour in administering the Sunday scheme would be in a better position to ascertain whether future changes are needed in the legislation and to recommend them to the Minister of Labour. The integration of Sunday legislation with legislation for other days of the week is also an important function particularly apt for this Department in respect of employment standards generally.

We appreciate that the proposed transfer of administration to the Department of Labour would create a "divided Sunday administration" in that the prosecutory discretion under section 16 of the federal *Lord's Day Act* would still remain with the Attorney General or his Deputy. Changes in that section can only be made by the Parliament of Canada. However, with the adoption of a plenary provincial scheme of Sunday legislation as proposed, complainants might be encouraged by the Attorney General to proceed under the provincial scheme wherever possible. In any event, we would view the divided administration as

³See Royal Commission Inquiry into Civil Rights (Hon. J. C. McRuer, Commissioner), Report No. 1, Volume 2, pp. 931-935.

⁴S.O. 1968, c. 35, ss. 30-34.

⁵R.S.O. 1960, c. 186, ss. 6, 7.

only temporary, pending the reform of federal Sunday legislation. Its inconveniences would be far outweighed by the advantages discussed above. We cannot emphasize too much the importance of making clear to the public the general purpose of the secular Sunday laws proposed, and a transfer of administration to the Department of Labour would be conducive to that end.

B. SUMMARY OF PROPOSALS AND ALTERNATIVES

1. The administration of the Ontario scheme of Sunday laws proposed should be the responsibility of the Department of Labour.

CHAPTER 21

SUMMARY OF PROPOSALS AND ALTERNATIVES

Chapter 9

1. Ontario should provide legislative support for a uniform weekly pause day for as many persons as possible. (pp. 267 & 268)

2. The uniform weekly pause day should be Sunday. (pp. 269 & 270)

3. The Ontario legislation providing support for a Sunday pause day should be secular, and not religious, in both purpose and effect. (pp. 269 & 270)

4. The legislation should have the dual secular purposes of (a) preserving a quality environment for the pursuit of leisure activities among families and friends; and (b) ensuring that as many persons as possible will be protected from being required to work on Sundays against their will. (pp. 271 & 272)

5. The title of the legislation should be "The Sunday Leisure Act", as a means of reflecting its secular purpose and effect. Alternative titles which might be considered are "The Sunday Act" or "The Sunday Rest and Recreation Act". (p. 273)

Chapter 10

6. The Legislature of Ontario has the constitutional jurisdiction to enact a plenary scheme of Sunday laws respecting provincial fields of activity as long as the legislation is carefully drawn to achieve secular and not religious purposes. (p. 286)

7. This secular plenary scheme of provincial Sunday laws can take either a prohibitive or a permissive form, and can be enforced by means of fines or other penalties. (pp. 286-290)

8. If the Legislature of Ontario wishes to enact a scheme of Sunday laws to achieve religious purposes (which we would not propose), then such legislation can only be permissive in form (but with limits to the permission), operating as exceptions from the general prohibitions in sections 4, 6 and 7 of the federal *Lord's Day Act*. Any prohibitive Sunday provisions for religious purposes must be made by the Parliament of Canada. (pp. 277-279)

9. If a secular plenary scheme of Sunday laws is to be enacted by the Legislature of Ontario, as we have proposed, it should contain provisions at the beginning clearly setting forth the secular purposes intended. Also, the legislation should incorporate all provincial laws respecting Sunday, either by direct inclusion or by cross-reference. Finally, it should be integrated or cross-referenced with "hours of work and business" provisions under *The Employment Standards Act*, *The Municipal Act* and *The Industrial Standards Act*. (p. 291)

Chapter 11

10. The Ontario scheme of Sunday laws should prohibit all forms of selling on Sunday except for certain clearly defined exceptions. (p. 294)

11. The exceptions from the general prohibition of Sunday selling should be based on their "essentiality", as measured by one or more of the following determinants: (1) humanitarian; (2) emergency; (3) perishability; (4) seasonal; (5) recreational; (6) familial; (7) convenience; and (8) technical. These determinants of essentiality should serve as rational guidelines against which demands for the Sunday operation of specific classes of stores and establishments can be easily assessed. (pp. 297-298)

12. Any exceptions from the general prohibition of Sunday selling should be carefully regulated and contained in order that the intended purposes of the legislation will not be eroded by camouflaged selling of non-essential items through "scrambled merchandising". (pp. 298 & 299)

13. The following methods of regulation and containment of "essential" Sunday selling are available for use in the legislation: (1) maximum number of employees; (2) maximum square footage; (3) product or trade designation; (4) maximum assessed value of premises or inventory; (5) hours limitation; (6) location restriction based on area and population density; (7) rotational system; (8) time of year; (9) type of management; (10) other physical limitations; and (11) licensing. (pp. 209-305)

14. The following classes of stores and business establishments should be permitted to engage in "essential" Sunday selling, subject to regulation and containment: (1) gasoline service stations; (2) drug-stores; (3) restaurants; (4) variety, convenience and jug milk stores; (5) tobacco shops and newsstands; (6) confectionery and candy shops; (7) nurseries; (8) fresh fruit and vegetable stands; (9) souvenir and novelty shops; and (10) antique markets. (pp. 305 & 306)

15. Gasoline service stations should be regulated and contained on Sunday by: (1) a strict trade designation ("the retail sale of gasoline and other products necessary for the physical operation of motor vehicles, and including essential motor vehicle repairs") with a 10% allowable variance; and (2) a rotational system; both of which should be administered by a provincial licensing body for each trading area of the province. The rotational system should be adopted by the licensing body after canvassing the views of each service station operator in the area, and should ensure that one service station is open Sundays in every village, town and city, and thereafter to a maximum of 20% of normal weekday capacity with provision for a reduction to 5% in off-hours. (pp. 306-308)

16. Drugstores should be regulated and contained on Sundays by: (1) a strict trade designation ("store selling drugs, medicines, medical appliances and other products usually sold in a drugstore") with a 10% allowable variance; (2) requiring a registered pharmaceutical

chemist to be on the premises during all Sunday hours; and (3) a maximum of six consecutive hours of operation as determined by each store; all of which should be administered by a provincial licensing body. One drugstore in each trading area of the province should be permitted by the licensing body to operate with no hourly restriction on a rotational basis for emergency purposes. The licensing body should be empowered in any given trading area where at least 75% of drugstores request it to adopt a rotational system. Any pharmaceutical chemist or his employees who supply medicines, drugs or medical appliances for the relief of sickness, ailment or death should be exempted from the Sunday selling prohibition at all times.

(pp. 308–310)

17. Restaurants should be regulated and contained on Sundays by a strict trade designation (“restaurants serving prepared food”) with a 10% allowable variance. (p. 311)

18. Variety, convenience and jug milk stores should be regulated and contained on Sundays by: (1) a maximum of three employees for the entire day including the owner or manager; (2) a maximum of 2,000 square feet of combined sales and stock area; (3) a maximum of six consecutive hours of operation as determined by each store; all of which should be administered by a provincial licensing body. In addition, the licensing body should be empowered, on application by one or more stores in a trading area, to impose a rotational system on Sundays for that area where, in the opinion of the licensing body, the convenience needs of the residents of the area would be adequately served by such a system. (pp. 313–316)

19. Tobacco shops and newsstands should be regulated and contained on Sundays by: (1) a product designation (“establishments whose principal trade consists of selling either tobacco products or printed materials published on a periodical basis with a frequency of at least four times per annum, or both”) with a 30% allowable variance; (2) an assessment of need in each trading area as determined by the licensing body having regard to such factors as accessibility to consumers and alternative sources of supply; and (3) a maximum of six consecutive hours of operation as determined by each store. Tobacco shops and newsstands located in hotels, motels and other lodging facilities should not be subject to the licensing requirement except where it appears to the licensing body that more than 30% of the products of these establishments are sold to persons who are not guests at the hotel, motel or lodging facility. (p. 316)

20. Confectionery and candy shops should be regulated and contained on Sundays by a strict trade designation (“confectionery and candy shops, but not including bakeshops”) with a 10% allowable variance. (p. 317)

21. Nurseries should be regulated and contained on Sundays by: (1) a product designation (“nurseries for the sale of growing trees, shrubs, plants and flowers for outdoor planting”) with a 10% allowable variance; and (2) a time of year limitation to the months of April, May, the first fifteen days of June, the last fifteen days of September and the month of October. (p. 318)

22. Fresh fruit and vegetable stands should be regulated and contained by: (1) a product designation ("the sale of fresh fruit and vegetables") with a 10% allowable variance; and (2) a time of year limitation to the period from May 1 to October 21, or alternatively, during the time when daylight saving time is in force throughout the province. (p. 318)

23. Souvenir and novelty shops should be regulated and contained on Sundays by: (1) a trade designation ("souvenir and novelty shops") with a price limitation ("... in which 70% of all items are sold at a price of \$10 or less"); (2) an assessment of tourist demand by the licensing body having regard to such factors as location and the presence of hotels and tourist attractions and the amount of non-resident traffic in each area; and (3) a maximum of six consecutive hours of operation as determined by each store; all of which should be administered by a provincial licensing body. (p. 319)

24. Antique markets should be regulated and contained on Sunday by a restriction to twelve Sundays of their own choosing each year upon approval of the provincial licensing body that they are a bona fide antique market. (p. 319)

25. The provincial licensing body should be appointed by the Lieutenant Governor in Council to hold office during pleasure. Licensing standards should be contained in the legislation as far as possible. Any discretion granted to the licensing body should be stated to be subject to particular purposes or policies clearly expressed in the legislation. The structure and organization of the licensing body and all matters of procedure, appeals and judicial review respecting licence applications, refusals, renewals, suspensions or revocations should conform to the recommendations of the Royal Commission Inquiry into Civil Rights, Report No. 1 (Ontario) pertaining to licensing.

(pp. 320 & 321)

Chapter 12

26. The Ontario scheme of Sunday laws should prohibit commercial services, businesses and the employment of labour on Sunday except for certain clearly defined exceptions. This prohibition should be supplementary to the general prohibition of selling on Sunday, and should be stated in the following words: "It shall be unlawful on Sunday for any person (a) to engage in or conduct business or labour for profit in the usual manner and location or to operate a place of business open to the public; (b) to cause, direct or authorize any employee or agent to engage in or conduct business or labour for profit in the usual manner and location, or to operate a place of business open to the public." (p. 326)

27. The exceptions from the prohibition in 26 should be based on their "essentiality", as measured by one or more of the following determinants: (1) humanitarian; (2) emergency; (3) perishability; (4) seasonal; (5) recreational; (6) familial; (7) convenience; and (8) technical. These determinants of essentiality should serve as rational guidelines against which demands for the Sunday operation of commercial services, businesses and the employment of labour on Sunday can be easily assessed. (pp. 327 & 328)

28. The following commercial services, businesses and employment of labour should be permitted on Sunday, subject to regulation and containment: (1) hotels, motels and other lodging facilities; (2) essential maintenance and domestic services; (3) services of real estate agents; (4) laundromats and other coin-operated establishments; (5) transportation services; (6) power, water and heating services; (7) communications services; (8) services to protect persons or property in danger of injury or destruction; (9) services ancillary to classes of stores or establishments excepted from the Sunday selling prohibition; (10) services permitted under section 11 of the federal *Lord's Day Act*; (11) services which are of a recreational, entertainment or cultural nature; and (12) manufacturing, production and construction services which must operate continuously as a matter of technical or economic necessity. (p. 328)

29. Hotels, motels and other lodging facilities should not be specially regulated in respect of Sunday operations except to the extent that they contain stores, shops or commercial services which are either prohibited or regulated on Sunday, in which case they should be subject to the proposals we have put forth for these stores, shops or services. (p. 329)

30. Essential maintenance and domestic services should not be specially regulated in respect of their performance on Sundays except by the term "essential maintenance of buildings, equipment and machinery and domestic services". (pp. 329 & 330)

31. Services of real estate agents should be permitted on Sunday except in respect of houses which are occupied or apartment buildings or attached town-houses which are occupied to the extent of 50% of the units. The actual sale or rental of premises on Sunday should be prohibited. (p. 330)

32. Laundromats and other coin-operated establishments should not be specially regulated in respect of Sunday operations except by a limitation to a maximum of one employee (including the owner or manager) for maintenance and security purposes. (p. 330)

33. Transportation of persons on Sundays should not be specially regulated. Transportation of freight on Sunday should be regulated by licences granted by the administrative tribunal or government department responsible for the general regulation of those transportation undertakings within provincial jurisdiction. In particular, Sunday trucking should be regulated by the Ontario Highway Transport Board and should be prohibited except for the transportation of perishable freight under the authority of a special perishable freight licence granted by the Board stating the permitted hours of Sunday operation and the perishable products for which the licence is applicable. The government of Ontario should request the government of Canada to delegate to the Ontario Highway Transport Board the regulation of Sunday trucking in Ontario which is now under federal jurisdiction. Also, the government of Canada should be requested to amend section 11(x) of the federal *Lord's Day Act* to reflect this arrangement. (pp. 331-333)

34. Power, water and heating services should not be specially regulated on Sundays except for a prohibition of delivery, repair or maintenance work which is not of an essential nature. (p. 333)

35. Communications services should not be specially regulated on Sundays except for a prohibition of those services not directly related to the daily or continuous operation of the communications facility in question. (p. 333)

36. Services to protect persons or property in danger of injury or destruction should not be regulated on Sundays. (p. 334)

37. Services ancillary to classes of stores or establishments excepted from the Sunday selling prohibition should be regulated by the requirement that they be performed on the premises of the store or establishment in question and be directly related to the items permitted to be sold. (p. 334)

Chapter 13

38. All recreational, entertainment and cultural facilities in Ontario should be permitted to operate on Sundays, subject only to municipal regulation or prohibition by bylaw. (pp. 337 & 338)

39. The province should not limit these activities to any specific areas or prescribe any time of commencement or termination. (p. 339)

40. Any municipal bylaw providing for the regulation or prohibition of these activities by prescribing the time of commencement or termination or otherwise should be directed towards secular and not religious objects. (p. 338)

41. Where regional municipal governments are in existence, the regulatory and prohibitory powers over recreational, entertainment and cultural facilities should be delegated to the regional government unit and not to each municipal government within the region. (pp. 339 & 340)

42. The regulation under *The Game and Fish Act* prohibiting Sunday hunting in various parts of the province should be repealed. Sunday hunting should be treated in the same manner as all other forms of recreation on that day, i.e., permitted unless regulated or prohibited by local bylaw. (pp. 340 & 341)

Chapter 14

43. The Ontario scheme of Sunday laws should prohibit the employment of any person on Sunday in a manufacturing, production or construction enterprise run for a profit, except for certain clearly defined exceptions. (p. 343)

44. The exceptions from the prohibition in 43 should be determined by the need for continuous or seven-day production based on technical or economic necessity. (pp. 343 & 344)

45. The following industries should be permitted to operate on Sundays: (1) mining, concentrating and smelting; (2) petroleum refining; (3) primary steel production; (4) pulp and paper production; (5) chemical refining and production; (6) commercial fishing; and (7) necessary agricultural activities. (pp. 344 & 345)

46. Provision should be made in the legislation for such further excepted classes of industries as are designated by the Lieutenant Governor in Council for reasons of technical or economic necessity. (p. 345)

Chapter 15

47. The provincial licensing body should be empowered to grant additional exemptions from the Sunday prohibitions for any class of store or business establishment within any regions, townships or municipalities, or parts thereof, which are designated as "tourist areas" by the Lieutenant Governor in Council. (pp. 347 & 349)

48. Tourist area exemptions should be granted upon application by one or more stores or business establishments within a class, and should specify the class and the time of year. They should not be capable of being restricted to sub-areas within a tourist area nor to specific stores or business establishments, nor should it be restricted as to time of day. (p. 348)

49. Before granting a tourist area exemption, the licensing body should be required to convene a conference to consider (1) the views of all other stores or business establishments in the class under review; (2) the views of the regional, township and municipal councils in the tourist area under review; (3) the recreational, entertainment and cultural needs of the tourists in the area, having regard to the importance of the tourist industry to the economic well-being of that area; and (4) the views of employees in that class of store or business establishment for which the application is made. The licensing body should also be required to advertise its intention of making a tourist area exemption order before so doing, and should take into account any written objections received. (pp. 348 & 349)

Chapter 16

50. The Ontario scheme of secular Sunday laws should not contain a sabbatarian exemption clause. (pp. 351 & 352)

Chapter 17

51. The Ontario scheme of Sunday laws should not include the type of prosecutory discretion contained in section 16 of the federal *Lord's Day Act*. Instead, prosecutions for violations of the legislation should proceed on the same basis as for any other provincial legislation creating offences for violations of its substantive provisions, i.e., without requiring the consent of the Attorney General or his Deputy. (pp. 354-357)

52. Maximum fines for offences under the Ontario scheme of Sunday laws should be set at \$100 for individuals and \$1,000 for corporations on first offence; and \$250 for individuals and \$2,500 for corporations on second and subsequent offences. (p. 357)

Chapter 18

53. *The One Day's Rest in Seven Act* should be expanded to cover all employers in all parts of the province, not just those employers operating hotels, restaurants and cafés in communities of 10,000 population or more. (p. 359)

54. Exemptions from the minimum one day's rest in seven requirement should be permitted by the licensing body for individual or classes of industries or businesses on the basis of humanitarian, economic, emergency or seasonal considerations. Before making an exemption order, the licensing body should be required to consult the employees to be affected, either through their union or individually, and also other employers to be affected. Provision should be made for public hearings where necessary. (p. 360)

55. All exemption orders issued by the licensing body should require exempted employers to provide employees with compensatory time off of a total duration at least equivalent to twenty-four hours in every seven days. (p. 360)

56. *The One Day's Rest in Seven Act*, expanded and modified as proposed above, should be brought into and integrated with the legislative scheme for Sunday which we have proposed. Alternatively, it should be integrated with *The Employment Standards Act*, which should then be cross-referenced with the legislative scheme for Sunday. (pp. 361 & 362)

57. Neither the Ontario scheme of Sunday laws nor *The Employment Standards Act* should include a requirement of premium rates for Sunday work. (pp. 362 & 363)

Chapter 19

58. The validity of contracts made on Sunday should be determined by the Courts in accordance with the general rules relating to illegal contracts. Therefore, if a contract is made on Sunday in violation of a Sunday observance law, it should continue to be unenforceable. (pp. 364-366)

59. There should be no changes in the common law rule invalidating Court proceedings on Sunday. Similarly, there should be no change in section 126 of *The Judicature Act* which invalidates the service or execution on Sunday of any legal process. (pp. 366 & 367)

60. The term "Lord's Day" in section 126 of *The Judicature Act* should be amended to read "Sunday". (p. 367)

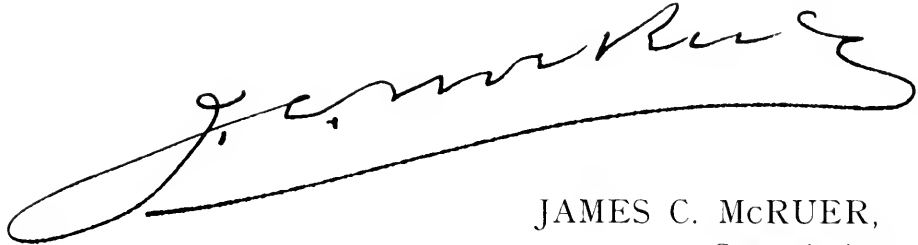
Chapter 20

61. The administration of the Ontario scheme of Sunday laws proposed should be the responsibility of the Department of Labour. (pp. 368-370)

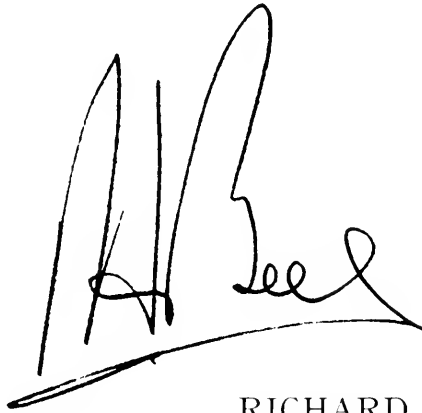
All of which is respectfully submitted.

A handwritten signature in cursive script that reads "H. Allan Leal".

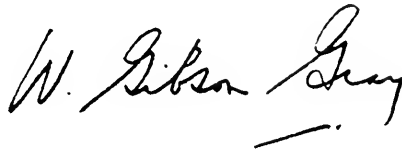
H. ALLAN LEAL,
Chairman

A long, flowing handwritten signature in cursive script that reads "James C. McRuer".

JAMES C. McRUER,
Commissioner

A handwritten signature in cursive script that reads "Richard A. Bell".

RICHARD A. BELL,
Commissioner

A handwritten signature in cursive script that reads "W. Gibson Gray".

W. GIBSON GRAY,
Commissioner

A handwritten signature in cursive script that reads "William R. Poole".

WILLIAM R. POOLE,
Commissioner

February 26th, 1971.

APPENDICES

APPENDIX I

THE ROMAN LAWS OF SUNDAY OBSERVANCE

S U M M A R Y

- A. THE EARLY ROMAN LAWS (321–469 A.D.)
- B. THE CHURCH LAWS OF THE HOLY ROMAN EMPIRE
(469–858 A.D.)

A. THE EARLY ROMAN LAWS (321–469 A.D.)

The first Sunday observance laws are attributed by virtually all authorities to the Roman Emperor Constantine in 321 A.D. While there are earlier historical references in Virgil¹ to practices of the Roman world in abstaining from various sorts of labour upon days consecrated by religious observances and festivals and in the Bible to Christians observing a religious festival on the first day of each week to commemorate the resurrection of Jesus Christ, these voluntary practices can hardly be considered “laws” in the sense in which that term is regarded today. (The religious origins of Saturday and Sunday as special days were considered in Chapter 4.)

Constantine’s edicts in 321 A.D. were as follows:

A. Let all judges and all city people and all tradesmen rest upon the *venerable day of the sun*. But let those dwelling in the country freely and with full liberty attend to the culture of their fields; since it frequently happens that no other day is so fit for the sowing of grain, or the planting of vines; hence, the favorable time should not be allowed to pass, lest the provisions of heaven be lost.

Given the seventh of March, Crispus and Constantine being consuls, each for the second time (321).

“Codex Justin,” lib. iii, tit. xii, lex 3.²

B. The august Emperor Constantine to Elpidius;

As it seemed unworthy of the day of the sun, honored for its own sacredness, to be used in litigations and baneful disputes of parties, so it is grateful and pleasant on that day for sacred vows to be fulfilled. And, therefore, let all have the liberty on the festive day of emancipating and manumitting slaves, and besides these things let not public acts be forbidden.

¹A. H. Lewis, *A Critical History of Sunday Legislation* (1888), p. 14. For a less detailed but useful treatment of many of the same Roman laws discussed in this section, see George S. Holmsted, *The Sunday Law in Canada* (1912), pp. 9–16.

²*Ibid.*, p. 19.

Published the 5th, before the nones of July, at Caralis, in the consulship of Crispus II and Constantine II (321).

"Codex Theo.," lib. ii, tit. viii, lex 1.³

There are two features of these first Sunday laws which are of contemporary significance. First, they enjoined all city people and tradesmen to rest on Sundays, but they permitted certain exceptions for those persons engaged in agriculture or those who wished to free slaves or those who were required to perform public acts. Thus these early laws were prohibitive in nature, permitting certain exceptions of a practical sort; in this respect, they took much the same form as the present Sunday observance laws in Canada and other western jurisdictions. It was recognized by Constantine, for example, that while Sunday rest might generally be a desirable social objective, it was not practical to apply this to agriculture for the obvious reasons which were stated in the law itself.

Second, these early laws sought to set aside Sunday as a special day not to promote any Christian idea but to honour the day of the Sun, the Apollo of Greek and Roman mythology. While Constantine was not unmindful that Sunday was of significance to the Christians as the day of the resurrection of Jesus Christ, his Sunday edicts were the product of the pagan practice of sun worship which was just one of several religions which the state, as the supreme source of power in the Roman Empire, chose to recognize. Religion in Rome at the beginning of the fourth century was regarded as subordinate to the state, to be protected and regulated by the civil law, and the Christian religion was no exception to this. It is true that Constantine gave Christianity, along with other religions, general recognition early in his reign, and generally showed sympathy to Christianity to the point where he was baptised as he lay on his death bed in 337 A.D.⁴ But the fact remains that the original Sunday observance laws in the Roman Empire were pagan in their origin. The Christians numbered only 5% of the total population of the Roman Empire in 321 A.D., and were probably not capable at that time, in terms of both numbers and influence, to produce legislation with a purely Christian object.⁵

It was not until 386 A.D., 65 years later, that the term "Lord's day" appeared in any civil legislation of the Roman Empire. This followed shortly after Christianity was made the official religion of the Roman Empire in 380 A.D. But even then, there was a comingling of the pagan element with the Lord's day element:

A. The three august emperors, Gratianus, Valentinianus, and Theodosius, to Rufinus pretorian prefect:

[after prohibiting civil judges from attending certain degrading public shows which were purported to interfere with the administration of justice, this law went on to decree . . .]

³*Ibid.*, pp. 34-35.

⁴*Ibid.*, p. 10, as recounted from Schaff, Church History (rev. ed. 1884), vol. iii, pp. 12, 14-15.

⁵*Ibid.*, pp. 31-32, as recounted from Gibbon, Decline and Fall of the Roman Empire (1883), vol. i, p. 583.

II. We also give this admonition, that no one shall offend against the law just promulgated, nor exhibit any show to the people on the day of the sun, nor commingle divine worship with the completed festival (blood of slain beasts).

Dated the thirteenth before the calends of June, at Heraclea, in the consulship of most noble, pious Honorius and most distinguished Euodius (386).

"Codex Theo.," lib. xv, tit. v, lex 2.

B. On the day of the sun, properly called the Lord's Day by our ancestors, let there be a cessation of lawsuits, business, and indictments; let no one exact a debt due either the state or an individual; let there be no cognizance of disputes, not even by arbitrators, whether appointed by the courts or voluntarily chosen. And let him not only be adjudged notorious, but also impious who shall turn aside from an institute and rite of holy religion.

Published the third before the nones of November, at Aquilia; approved at Rome the eighth before the calends of December, in the consulship of most noble, pious Honorius, and most illustrious Euodius (386).

"Codex Theo.," lib. viii, tit. viii, lex 3.⁶

Three years later, this legislation was enlarged to include, as additional days of rest and holiday, an increased number of pagan festivals including the birthdays of the emperors and the days on which they assumed the imperial office. Another three years later, in 392 A.D., further legislation prohibited the games of the circus on the "festive days of the sun" in order that "no gatherings or shows may turn away the attendance from the venerable mysteries of the Christian religion",⁷ thus indicating the increasing influence of Christianity as the newly acquired state religion. This is further substantiated by the law decreed by the emperors Arcadius and Honorius in 399 A.D. that, on the Lord's day, there should be no celebration of theatrical sports nor horse races nor any shows in any city, "which are found to enervate the mind".⁸ This prohibition was made more restrictive in 409 A.D. by extending it to Sundays even though the anniversary of the founding day of the empire or the emperor's birthday fell on that day.⁹

While there was some evidence in decrees of the emperors in 400 A.D. and 425 A.D.¹⁰ that Sunday still held no preeminence over any other religious day such as the emperor's birthday, it would appear that by the middle of the fifth century, the Christians had succeeded in obtaining legal recognition of Sunday under Roman law as a special religious day quite unlike any other. The decree of the emperors Leo and Athemis in 469 A.D. is perhaps the best evidence of this fact:

⁶ *Ibid.*, pp. 35-37.

⁷ *Ibid.*, p. 38.

⁸ *Ibid.*, p. 39.

⁹ *Ibid.*, p. 44.

¹⁰ *Ibid.*, pp. 40, 44-46.

The august emperors Leo and Athemis, to Armasius, pretorian prefect:

We wish the festal days dedicated to the Majesty Most High, to be employed in no voluptuous pleasures, and profaned by no vexatious exactions.

1. Therefore we decree that the Lord's day shall always be so held in honor and veneration, that it shall be free from all prosecutions, that no chastisement shall be inflicted upon any one, that no bail shall be exacted, that public service shall cease, that advocacy shall be laid aside, that this day shall be free from judicial investigations, that the shrill voice of the crier shall cease, that litigants shall have rest from their disputes, and have time for compromise, that antagonists shall come together without fear, that a vicarious repentance may pervade their minds, that they may confer concerning settlements and talk over terms of agreement. But, though giving ourselves up to rest on this religious day, we do not suffer any one to be engaged in impure pleasures. On this day the scenes of the theatre should make no claim for themselves, neither the games of the circus nor the tearful shows of the wild beasts; and if the celebration should happen to fall on our birthday it may be postponed.

He shall suffer the loss of his office and the confiscation of his estate, who shall attend the games on this festal day, or shall, as a public servant, under pretence of public or private business, cause these enactments to be treated with contempt.

Dated, December 13, at Constantinople, Zeno and Martianus being consuls (469).

"Codex Justin," lib. iii, tit. xii, lex 11.¹¹

The early Roman legislation also provided a vehicle for humanitarianism. In 409 A.D., better treatment was ordered for prisoners on Sunday by the emperors Honorius and Theodosius through the provision of extra food and a bath. The same year, legislation was passed prohibiting the exhibition of any shows of prisoners on Sunday and permitting the further liberation of slaves on that day while other causes or litigations were to rest.¹² Of course, as previously noted, the first edicts of Constantine in 321 A.D. had permitted the act of liberating slaves on the day of the sun.

In summary, the Roman Sunday laws, although pagan in origin, took on predominant Christian elements in the fifth century. For the most part, they were prohibitive, forbidding business, legal proceedings, the theatre, circus and exhibitions of wild beasts, and eventually even the celebration of the emperor's birthday. Exceptions were made for agriculture and certain public acts as well as for humanitarian acts relating to the treatment of prisoners and the liberation of slaves on Sundays. These exceptions were obviously the forerunners to what eventually became known as "works of necessity

¹¹ *Ibid.*, pp. 47-48.

¹² *Ibid.*, pp. 43-44.

or mercy'', a concept which still exists in Sunday observance legislation in most of the jurisdictions of the western world including Canada.

George S. Holmsted, in his useful book entitled *The Sunday Law in Canada*¹³ published in 1912, notes that while the early Sunday observance laws of the Roman Empire extended to that territory now known as England, these laws were swept away by the Saxon invaders and the common law cannot be traced directly to that source. However he does point out that Roman law became a fountain from which early English jurists did not hesitate to draw inspiration in framing rules of decision and promulgating principles of law. In short, the influence of the early Roman Sunday legislation on subsequent English, Canadian and Ontario enactments in the field is substantial.

B. THE CHURCH LAWS OF THE HOLY ROMAN EMPIRE

(469-858 A.D.)

The influences bringing about the fall of the Roman Empire in the fifth century made it possible for the Christian Church, already incorporated with the state by that time through civil legislation, to rise to power upon the ruins of the broken empire as the Holy Roman Empire, with the Pope becoming what the emperor had been. The law relating to Sundays reverted to the ecclesiastical, and members of the clergy were often entrusted with judicial power in hearing business matters between those who did not wish to go to law before heathen judges. With respect to whether such causes should be heard on Sunday, the Council of Tarragon, in 516 A.D., ordered as follows:

Let not any bishop or presbyter or any of the inferior clergy hear causes on the Lord's day, etc., . . . but let them be occupied in the performance of the solemnities ordained in honor of God.

"Council of Tarragon", chap. iv, can. xv; Binius, tome x, p. 625.¹⁴

Then in 538 A.D., the Third Council of Orleans decreed that the people should abstain from rural work (i.e., agriculture) in order that they more readily might come to the churches and have the leisure for prayers. Seventy years later, the Council of Auxerre prohibited the yoking of oxen on the Lord's day,¹⁵ and about the same time Pope Gregory I made a similar law in Rome. Perhaps the strongest exhortation concerning the observance of the Lord's day came from the Second Council of Macon in 585 A.D. in which the Lord's day was declared to be the "day of perpetual rest", and in which it was stated that if anyone disregarded this exhortation or treated it contemptuously, not only would he draw upon himself the wrath of God and the unappeasable anger of the clergy, but if he were a country man or slave he would be soundly beaten with whips.¹⁶

¹³*Op. cit.*, p. 16.

¹⁴Lewis, *op. cit.*, p. 64.

¹⁵*Ibid.*, p. 64.

¹⁶*Ibid.*, pp. 65-66.

Over the next 300 years, Councils and Synods of clergy extended these types of exhortation to virtually all days of any religious significance to the Christians. The only ameliorating voice in this period was that of Pope Nicholas I in 858 A.D. who instructed the Burgundians that there were no days on which works of necessity, such as journeying, fighting, etc., might not be performed. He urged that "our hopes do not rest upon the observance of days, but upon the true and living end", but if necessity did not prevent, the leisure of those days ought to be spent in prayer, "and in attending on the mysteries of these great festivals".¹⁷ For the most part, however, the laws of the Councils and Synods (i.e., the commands of the Church) were rigidly enforced, often by special officers called "*missi dominici*", and the penalties prescribed for violations were generally severe.

¹⁷*Ibid.*, p. 67.

APPENDIX II

THE HISTORY OF THE ENGLISH LAWS OF SUNDAY OBSERVANCE

S U M M A R Y

- A. THE EARLY SAXON LAWS (688–1056 A.D.)
- B. PRE-REFORMATION LAWS (1066–1500 A.D.)
- C. POST-REFORMATION LAWS (1500–1900 A.D.)

A. THE EARLY SAXON LAWS (688–1056 A.D.)

In many respects, the Saxon laws were the product of the ecclesiastical commands of the Holy Roman Empire.¹ The Saxon kings were greatly influenced by the bishops of the Christian Church up until the time of the conquest in 1066 A.D. However, one can detect in these early Saxon laws the occasional social objective which went beyond merely the religious protection of the Lord's day. Consider, for example, the extent to which the following law, promulgated by Ine who was king of Wessex from 688–725 A.D., can be characterized as labour legislation:

If a theowman (slave) work on Sunday by his lord's command, let him be free; and let the lord pay thirty shillings as a fine. But if the theow work without his knowledge, let him suffer in his hide, or in hide-gild (money paid in lieu of corporal punishment). But if a freeman work on that day without his lord's command, let him forfeit his freedom, or sixty shillings; and be a priest doubly liable.²

A similar law was decreed by King Withread in the neighbouring kingdom of Kent about 696 A.D. but it said nothing of the lord's obligation not to command his slaves to work on that day. However, this law contained an interesting provision under which a person who detected a freeman working at the forbidden time would be entitled to have half the fine ultimately paid by the violator.³ This type of provision appeared in early Ontario legislation in the nineteenth century and still exists today in the province of Quebec in respect of persons illegally selling goods on Sunday.⁴

Other Saxon kings also decreed Sunday laws with labour as well as religious objects. Alfred, King of Wessex from 871 to 901 A.D., promulgated laws against Sunday labour and provided that if a lord obliged his slave to work on a festival day, he would be subject to the payment of certain fines.⁵ Among the Canons of Aelfric, the "Unknown Archbishop", whose date is unknown but is placed from

¹ Holmsted, *The Sunday Law in Canada*, p. 16.

² Lewis, *A Critical History of Sunday Legislation*, p. 71.

³ *Ibid.*

⁴ *Sunday Observance Act*, R.S.Q. 1964, c. 302, s. 9.

⁵ Lewis, *op cit.*, p. 73.

957 to 1051 A.D., was a command to the mass priests to see to it that their parishioners were freed from all servile work.⁶ And among the secular laws of Canute, King of England from 1017 to 1035, were found injunctions against freemen and slaves working on a festival day and a provision that if a lord compelled his slave to work on a festival day, then the slave would be freed and the lord fined.⁷

Laws against Sunday marketing were even more common during this period. Alfred, King of Wessex from 871 to 901 A.D., made it an offence to engage in Sunday marketing; so did the Council of Greatanlea under Aethelstane about 924 A.D.⁸ King Edgar, who reigned from 959 to 975 A.D., prohibited "Sunday trading and folk motes"⁹ and his decree was duplicated, then expanded by the Council of Enham under Ethelread who reigned from 978 to 1016 A.D.¹⁰ Included among the ecclesiastical laws of King Canute was a prohibition against Sunday marketing "unless it be for great necessity".¹¹

Also during this period we see the beginnings of specific prohibitions against various forms of recreation and entertainment on Sunday. Both Ethelread and Canute prohibited hunting on Sunday as well as all other "worldly works".¹² King Edgar prohibited "heathen songs and devil's games".¹³ And among a group of laws attributed to the priests of Northumbria, of unknown date but probably belonging to the last half of the tenth century, is found the following:

Sunday traffic we forbid everywhere, and every folk-mote, and every work, and every journey, whether in a wain, or on a horse, or as a burthen.¹⁴

Several of the Saxon kings attempted to extend the observance of Sunday to include a portion of Saturday. In the ecclesiastical laws of both King Edgar and King Canute, it was provided that the Sunday festival was to be observed from noon Saturday till the dawn of Monday.¹⁵ Edward the Confessor, the last Saxon king before the Norman conquest in 1066 A.D., promulgated a law in 1056 providing for compulsory religious observance and protection of God in the Holy Church during a number of specific Christian holidays and also "every Sabbath from the ninth hour, and through the whole following day till Monday".¹⁶

⁶*Ibid.*, p. 75.

⁷*Ibid.*, p. 79.

⁸*Ibid.*, pp. 72, 73; also see Holmested, *op. cit.*, p. 17.

⁹*Ibid.*, p. 74.

¹⁰*Ibid.*, p. 76.

¹¹*Ibid.*, p. 77; also see Holmested, *op. cit.*, p. 17.

¹²*Ibid.*

¹³*Ibid.*, p. 74.

¹⁴*Ibid.*, p. 77.

¹⁵*Ibid.*, pp. 74, 77; also see Holmested, *op. cit.*, p. 18.

¹⁶*Ibid.*, p. 79. Holmested states that the proper translation for this law reveals that what is meant is: "Saturday from 3 o'clock p.m. and the whole of the following day until Monday", *op. cit.*, p. 18.

In summary of the Saxon period, there well might have been certain social objectives of a secular nature in prohibiting Sunday labour, Sunday marketing, and Sunday hunting and other forms of recreation and entertainment. However the dominant theme of most of the legislation was to compel religious observance of Sunday as a holy day. While the earliest Saxon laws were much like those of Rome in that they were equally consistent with a pagan as with a Christian purpose, by the time of Ethelread and Canute at the beginning of the 11th century, the laws had become purely Christian in their intent.

B. PRE-REFORMATION LAWS (1066–1500 A.D.)

Sunday observance laws in England following the Conquest in 1066 brought about an expansion of the Saxon laws. And it was in this period that the Christian Church in England began to claim officially that the religious observance of the Lord's day complied with the Old Testament fourth commandment to observe the legal Sabbath, according to the canonical institutes.¹⁷

Despite the continuance of the Saxon laws and further enactments by Edward I in 1285 prohibiting fairs and markets in churchyards, by Edward III in 1354 prohibiting the showing of wools on Sunday, and by Henry IV in 1409 prohibiting certain games on Sundays, it would seem that Sunday markets embracing the sale of food, clothing and other articles were very popular in this period. Apparently Sunday had gradually become not only a general business day but a day for all kinds of immoral and degrading activities, not the least of which was drunkenness. A number of exhortations and commands of the Archbishop of Canterbury and other bishops in the Church of England recorded from the 14th century¹⁸ reflect the "damnable perverseness"¹⁹ which prevailed at the time. Islep, the Archbishop of Canterbury, noted in 1359 that:

. . . the tavern on these days is more frequented than the church, and there is greater abundance of junkets and drunkenness than of tears and prayers; and men spend their leisure in debauchery and quarrels more than in devotion; not to omit that covenant servants . . . under a lawful pretence, do abstain from work on holidays . . . , and yet take no less on that account for their weekly wages, by which the public good is clogged and obstructed; nor do they sabbatize in honour of God, but to the scandal of Him and Holy Church, as if these solemnities were intended for the exercise of profaneness and mischief, which increase in proportion to the number of these days.²⁰

Henry IV in 1409 A.D. prohibited certain games and recreations on Sunday, including the carrying of swords or daggers or the playing of tennis, football, dice and skittles. However an earlier

¹⁷See Lewis, *ibid.*, pp. 81–82.

¹⁸*Ibid.*, pp. 82–89.

¹⁹*Ibid.*, p. 83.

²⁰*Ibid.*, p. 86.

statute of Richard II in 1389 A.D. had encouraged certain classes of citizens to use bows and arrows on Sundays and holy days. Holmested points out that bows and arrows were at that time still weapons of war, and the Act would be paralleled in modern times by an Act requiring those against whom it was directed to practise rifle shooting on Sunday, the Legislature having in mind the necessity of fitting men for the defence of their country against possible enemies.²¹

The only major piece of legislation emerging from the pre-Reformation period was the *Sunday Fairs Act*, enacted in 1448 A.D. by Henry VI.²² This law remained in force in England until 1969,²³ and theoretically might have been considered law in Canada up until 1955 to the extent that it was not in conflict with the federal *Lord's Day Act* or provincial legislation derived therefrom.²⁴ The *Sunday Fairs Act*, after reciting certain "abominable injuries and offences done to Almighty God and to his Saints" by virtue of activities associated with fairs and markets such as bodily labour, deceitful bargaining, drunkenness and religious non-observance, provided that:

. . . all manner of fairs and markets in the said principal feasts and Sundays and Good-Friday, shall clearly cease from all shewing of any goods or merchandises, necessary victual only except, upon pain of forfeiture of all the goods aforesaid, so shewed, to the lord of the franchise or liberty where such goods, contrary to this ordinance be or shall be shewed, the four Sundays in harvest except; . . .

In addition to the exceptions for necessary victuals and the four Sundays in harvest as above, the Act provided that where franchises had been granted previously to hold the markets on Sundays or any other holy day, they might be held within three days before or three days after the holy days involved (including Sundays) so as to give the holder of the franchise the full number of days to which he had previously been entitled.

Edward IV in 1464 A.D. amended the *Sunday Fairs Act* to include among the prohibitions the sale of any shoes, hose or galoshes by any cobbler or cordwainer in the city of London or within three miles thereof. However this addition was repealed by Henry VIII in 1523.²⁵

C. POST-REFORMATION LAWS (1500-1900 A.D.)

With the Reformation came not only the more strict legislative curtailment of commercial activities and recreation on Sundays and holy days, but the use of Sunday observance legislation for political purposes. The papal jurisdiction of Rome over the Church in

²¹ Holmested, *op. cit.*, p. 20.

²² 1448, 27 Hen. 6, c. 5.

²³ Repealed by the *Statute Law (Repeals) Act, 1969*, 18 Eliz. 2, c. 52.

²⁴ This point is fully discussed in Chapter 5.

²⁵ 1523, 15 Hen. 8, c. 9.

England was set aside, and the kings of England, particularly the Tudors and Stuarts, assumed the spiritual power and overlordship of the Church. Religious orthodoxy was thought to be essential to the security of the Sovereign and several statutes were enacted by the Tudors and the Stuarts in an effort to force all of the Sovereign's subjects to conform to the practices and beliefs of the established Church. The legislation of the pre-Reformation and Saxon periods had been primarily directed towards the curtailment or abolition of worldly activities on Sunday, and there was little in the way of compulsory religious obligation. Tudor legislation, on the other hand, required open adherence on Sundays and other holy days to the practices and doctrines of the established Church in England, in an effort to produce political as well as religious conformity.

The first example of this was the *Statute of the Six Articles*, sometimes called *An Act Abolishing Diversity in Opinions*, passed in 1539 during the reign of Henry VIII which made it an offence to refuse to be confessed or to receive the holy and blessed sacrament of the Church of England, punishable by imprisonment and fine. Any such offender, after his conviction, who still refused to be confessed or to communicate was then to be adjudged a felon and to suffer the pains of death and the loss of all property.²⁶

However it was the Injunctions of both Edward VI and Elizabeth I, in apparent exercise of their assumed spiritual power, which proved conclusively that Sunday observance legislation had become a compulsory religious obligation and not merely the limitation of certain worldly activities on that day. Edward VI in 1547 commanded all his subjects to "celebrate and keep their holy day according to God's holy will and pleasure" and this included hearing the Word of God read and taught, in engaging in private and public prayers, in acknowledging offences to God, and in receiving communion. Members of the clergy were instructed to advise parishioners that this command did not apply in respect of labour on Sundays and holy days in the time of harvest.

The *Act of Uniformity* passed four years later²⁷ required all the king's subjects "having no lawful or reasonable excuse to be absent" to attend their parish church or chapel or some usual place where Common Prayers and Service of God were held "upon every Sunday and other Days ordained and . . . kept as Holidays, and then and there to abide orderly and soberly during the Time of the Common Prayer, Preachings or other Service of God . . . upon Pain or Punishment by the Censures of the Church."

A year later in 1552, *An Act for the Keeping of Holy Days and Fasting Days* was enacted under Edward VI, making perfectly clear what days the Sovereign authority considered as holy days and the extent of observance required:

. . . Neither is it to be thought that there is any certain Time or definite Number of Days prescribed in holy Scripture, but that the appointment both of the Time and also of the Number of

²⁶ 1539, 31 Hen. 8, c. 14.

²⁷ 1551, 5 & 6 Edw. 6, c. 1.

Days, is left, by the Authority of God's Word, to the Liberty of Christ's Church, to be determined and assigned orderly in every Country, by the Discretion of the Rulers and Ministers thereof, as they shall judge most expedient to the true setting forth of God's Glory, and the Edification of their People; Be it therefore enacted by the King our Sovereign Lord, with the assent of the Lord's Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That all the Days hereafter mentioned shall be kept and commanded to be kept Holy-days, and none other; that is to say, all Sundays in the Year, . . .

II. And it is also enacted by the Authority aforesaid, That every Even or Day next going before any of the aforesaid Days . . . shall be fasted, and commanded to be kept and observed, and that none other Even or Day shall be commanded to be fasted.

III. And it is enacted by the authority aforesaid, that it shall be lawful to all Archbishops and Bishops in their Dioceses, and to all other having Ecclesiastical or Spiritual Jurisdiction, to enquire of every Person that shall offend in the Premises, and to punish every such Offender by the Censures of the Church, and to enjoin him or them such Penance as shall be to the Spiritual Judge by his Direction thought meet and convenient.²⁸

As an indicator of the extent to which the Sovereign authority would go in protecting divine worship in the established Church, reference should be made to the *Brawling Acts* of Edward VI²⁹ and Queen Mary.³⁰ These statutes, *inter alia*, forbade interference with divine worship and punished quarrelling and fighting in and around places of worship. Although the statute of Queen Mary was relatively mild, providing only for imprisonment for three months and binding over to keep the peace, its predecessor passed under Edward VI provided that in extreme cases involving malice or the use of a weapon, the accused, once convicted, was:

. . . to have one of his ears cut off; and if the person or persons so offending have no ears whereby they should receive such punishment as is afore declared, that then he or they to be marked and burned in the cheek with a hot iron having the letter F therein whereby he or they may be known and taken for fraymakers and fighters. . . .³¹

The 1552 Act under Edward VI entitled *An Act for the Keeping of Holy Days and Fasting Days* was repealed in 1553³² under his sister Queen Mary who sought to return England to the papal authority of Rome in all religious matters. However, Queen Mary's reign and the persecution of the Protestants lasted only five years, and Elizabeth I ascended the throne in 1558 to adopt a middle course between the

²⁸ 1552, 5 & 6 Edw. 6, c. 3.

²⁹ 1552, 5 & 6 Edw. 6, c. 4.

³⁰ 1553, 1 Mar. (2nd. Sess.), c. 3.

³¹ 1552, 5 & 6 Edw. 6, c. 4 (old English spelling omitted).

³² Lewis, *op. cit.*, p. 97.

strict injunctions passed in the time of Edward VI and the allegedly immoral and commercial Sunday which prevailed in the pre-Reformation period. Dominant throughout, of course, were political considerations and Elizabeth I throughout her reign aimed at shaping a Church which as many of her people as possible would accept, thus uniting the nation.³³ During her reign, Elizabeth put forth a list of injunctions consistent with the compulsory observance of Sundays and church attendance, like the injunctions of Edward VI. But the language was not as obligatory and the penalties for violations were less severe:

Injunction 20. Item, all the queen's faithful and loving subjects shall, from henceforth celebrate and keep their holyday according to God's will and pleasure; that is, in hearing the Word of God read and taught, in private and public prayers, in acknowledging their offenses unto God, and amendment of the same, in reconciling themselves charitably to their neighbors where displeasure hath been, in oftentimes receiving the communion of the very body and blood of Christ, in visiting of the poor and sick, using all soberness and godly conversation. Yet notwithstanding, all parsons, vicars, and curates shall teach and declare unto their parishioners, that they may with a safe and quiet conscience, after their common prayer in the time of harvest, labor upon the holy and festival days, and save that thing which God hath sent; and if for any scrupulosity or grudge of conscience, men should superstitiously abstain from working upon those days, then they should grievously offend and displease God. . . .³⁴

Injunction 46. Item, that in every parish three or four discrete men, which tender God's glory, and his true religion, shall be appointed by the ordinaries diligently to see, that all the parishioners duly resort to their church upon all Sundays and holy days, and there to continue the whole time of the godly service; and all such as shall be found slack and negligent in resorting to the church, having no great or urgent cause of absence, they shall straightly call upon them, and after due admonition if they amend not, they shall denounce them to the ordinary.³⁵

The *Act of Uniformity* of 1559³⁶ passed early in Elizabeth's reign imposed the moderate penalty of one shilling for absenting oneself from church without lawful or reasonable excuse. And it is reported that in 1569 Elizabeth granted one of her subjects permission to hold such Sunday sports events as archery, leaping, wrestling, throwing the sledge, pitching the bar, and other similar sports which were popular, especially with the "ruder" people at that time.³⁷

³³ Robert M. Rayner, *Short History of Britain* (3rd ed. 1957), pp. 220-221.

³⁴ Lewis, *op. cit.*, p. 99.

³⁵ *Ibid.*, p. 100.

³⁶ 1559, 1 Eliz. 1, c. 2.

³⁷ Lewis, *op. cit.*, pp. 98-99.

Yet the spirit of Puritanism which began to spread rapidly towards the end of her reign, became apparant in the *Act Against Sectaries* enacted in 1593.³⁸ This Act made it an offence, punishable by imprisonment, to (1) refuse to attend some church, chapel or usual place of common prayer to hear divine service established by Her Majesty's laws and statutes; (2) to print, write or express words or to move or persuade any of Her Majesty's subjects to deny, withstand or impugn Her Majesty's power and authority in ecclesiastical causes; and (3) to come to or be present at any unlawful assemblies or meetings under colour or pretence of any exercise of religion contrary to Her Majesty's laws and statutes. Offenders were committed to prison until they agreed to conform. The *Act Against Papists*, enacted in 1593, provided that Roman Catholics convicted of failing to attend the established Church in England be required to register with the local authorities and forbidden to travel more than five miles from their homes; violations of this anti-travel provision led to forfeiture of all property in the realm, and those without homes were generally banished.³⁹

Although the influence of Puritanism was increasing when the first Stuart, James I, ascended the throne in 1603, the king still retained control of the observance of the Lord's day as a political matter and regulated that observance by proclamation as an exercise of assumed spiritual power. In 1618 James I issued a declaration to signify his pleasure that on Sundays after divine service, "no lawful recreation should be barred to his good people, which should not tend to the breach of the laws of the Kingdom and the Canons of his (*sic*) church".⁴⁰ This declaration came to be known as the "Book of Sports", and in effect permitted dancing, archery, leaping, vaulting, May games, whitsun-ales, Morris dances, and the setting up of May poles, while prohibiting bear-baiting, bull-baiting, bowling and interludes. In order to have the right to take part in the sports which were authorized on Sunday, one had to attend divine service at the parish church. James I also commanded that the Book of Sports be read in all the churches, to counter the conduct of some of the Puritan authorities in Lancashire who had excited much discontent by suppressing the customary recreations of the common people and thus giving a repulsive aspect to the religion of the Church of England. Apparently the command was not complied with⁴¹ and the matter was not taken up again until the Book of Sports was actually republished in greater detail by Charles I in 1633. Again the declaration was required to be read by the clergy in all the parish churches. This and other influences at the time eventually aroused such indignation and hostility among the Puritans and others that it contributed to the ultimate downfall of the monarchy beginning in 1640. In 1644, the Long Parliament ordered all copies of the Book of Sports to be called in and burned.⁴²

³⁸ 1593, 35 Eliz. 1, c. 1.

³⁹ 1593, 35 Eliz. 1, c. 2.

⁴⁰ Holmsted, *op. cit.*, p. 25.

⁴¹ *Ibid.*, p. 26; also Lewis, *op. cit.*, p. 103.

⁴² *Ibid.*, p. 28; also Lewis, *op. cit.*, pp. 102-103.

It was during the reign of Charles I in 1625 that the first modern *Sunday Observance Act*⁴³ was passed by the Imperial Parliament, which Act remained in force in England until its repeal in 1969.⁴⁴ This Act, after reciting that the holy keeping of the Lord's day was a principal part of the true service of God and that the Lord's day was profaned and neglected by disorderly people in various ways, declared:

. . . [T]here shalbe no meetings, assemblies or concourse of people out of their owne Parishes on the Lord's day, within this realme of England, or any the Dominions thereof, for any sports or pastimes whatsoever.

The Act also forbade any bear-baiting, bull-baiting, interludes, common plays or other unlawful exercises or pastimes used by any persons within their own parishes, and offenders were made liable to a fine of three shillings and four pence, for the use of the poor of the parish. It may be assumed that what was meant by other unlawful exercises were those made unlawful by James I's Book of Sports published seven years previously.⁴⁵

In 1627, another *Sunday Observance Act* was passed⁴⁶ which added to the list of prohibitions: travel by horse carriers, wagon men, cornmen with carts, wainmen with wains and drovers with cattle. Similarly, butchers were prohibited from killing or selling any animals or the meat thereof. Violation of any of the above prohibitions resulted in a monetary fine. This Act, like the 1625 *Sunday Observance Act*, was not repealed until 1969.

Following the Civil War, the execution of Charles I and the ascendancy of Cromwell in 1649 as head of the new English Commonwealth (this period 1649–1660 is often referred to as the Interregnum), the rigid Puritan practices relating to Sunday observance came into full flower. Theatres were closed, festivities on holy days such as Christmas abolished, and church images and stained glass windows were smashed. England became a grim and gloomy land under Puritan rules,⁴⁷ and as could be expected, this was clearly reflected in Sunday observance legislation.

Notwithstanding demands by the army to Parliament in 1647 to repeal all Acts requiring the use of the Book of Common Prayer or imposing any penalty for not going to church⁴⁸ and demands by a large group of people who drew up a document entitled "An Agreement of the People" in 1649 advocating Christianity by voluntary adherence and not state coercion,⁴⁹ Parliament under Cromwell passed

⁴³ *An Act for Punishing Divers Abuses Committed on the Lord's Day called Sunday*, 1625, 1 Car. 1, c. 1.

⁴⁴ *The Statute Law (Repeals) Act*, 1969, 18 Eliz. 2, c. 52.

⁴⁵ Holmsted, *op. cit.*, p. 27.

⁴⁶ *An Act for the Further Reformation of Sundry Abuses Committed on the Lord's Day commonly called Sunday*, 1627, 3 Car. 1, c. 2.

⁴⁷ Rayner, *op. cit.*, p. 284.

⁴⁸ Stephenson and Marcham, *Sources of English Constitutional History* (1937), p. 507.

⁴⁹ *Ibid.*, pp. 514–515.

legislation far more repressive than anything known under earlier English regimes. Parliament passed stringent Acts in 1644 and 1650 prohibiting on the Lord's day all forms of marketing, travel, worldly labours or any work whatsoever, as well as all forms of sports (including those originally permitted in the Book of Sports of James I), all writs, warrants or orders, and boats, taverns, tobacco shops and restaurants, etc.⁵⁰

However these laws were soon regarded as inadequate to accomplish the Sunday observance totalitarianism which was desired by those in power, and more detailed and coercive legislation was enacted by Parliament in 1656, to last for little more than three years before the end of the Cromwellian supremacy and the Commonwealth. Not only did this legislation⁵¹ prohibit virtually all forms of travel (except for necessity) and the serving of illegal travellers in inns or restaurants, but it prohibited dancing or profanely singing or playing upon musical instruments, grinding any corn or grain in any mill, working in the washing or whiting or drying of cloths, thread or yarn, and a long list of trades and an even longer list of entertainments such as wrestling, leaping and the ringing of bells for pleasure. It was an offence to walk in the churchyard or elsewhere at the time of public worship, and also, to be found "vainly and profanely walking" on the Lord's day. There were exemptions for the preparation of food in private homes and the preparation and sale of food in "a moderate way" in inns, victualling houses, and cook shops. There was also a limited right to engage in "the crying or selling of milk before 9 a.m. or after 4 p.m. from September 10 to March 10 or before 8 a.m. or after 5 p.m. during the rest of the year." Any other works of piety, necessity or mercy were to be allowed by a Justice of the Peace. All fairs and markets were prohibited on the Lord's day, and the serving of any writ, process warrant, order, judgment or decree (except in causes of treason, felony, breach of the peace, and profanation of the Lord's day) was prohibited.

Constables, church wardens and overseers of the poor were authorized under the legislation to demand entrance into any dwelling house or other place suspected of harboring a person profaning the Lord's day. While a limitation of one month was placed upon prosecutions, an exhaustive list of public officials was set out and it was on these men that fell the duty of enforcing the Act under pain of penalty of five pounds. Offenders under the Act were subject to severe fines, and in many cases, imprisonment. Every person (except those excused or allowed by a Justice of the Peace) was required to "diligently report to some Church or Chapel". Finally, clergymen were required to read the Act to their congregation on the first Sunday in March each year, immediately before the morning sermon.

The influence of these Puritan laws enacted under Cromwell did not disappear with the end of the Commonwealth (or Interregnum) in 1660. Many of the provisions found their way to New England

⁵⁰Lewis, *op. cit.*, pp. 115-126.

⁵¹*Ibid.*, pp. 126-140.

where they are still much in evidence today. Holmested notes, for example, in the "Blue" or "Bloody" laws of Connecticut the following provisions:

No one shall run on the Sabbath Day or walk in his garden or elsewhere except reverently to and from meeting.

No one shall kiss her child on the Sabbath or fasting days.

No one shall read Common Prayer, keep Christmas or Saints' days, make minced pies, dance, play cards or on any instruments of music except the drum, trumpet or jewsharp.⁵²

It is also clear from the wording of subsequent Sunday observance legislation enacted in England after the Restoration in 1660 that the draughtsmen had at least some of the Puritan legislation before them while preparing various legislative provisions. This fact was most obvious in the *Sunday Observance Act* of 1677,⁵³ enacted during the reign of Charles II. Like the enactments of 1448 (the *Sunday Fairs Act*), 1625 (*An Act for Punishing Divers Abuses Committed on the Lord's Day called Sunday*) and 1627 (*An Act for the Further Reformation of Sundry Abuses Committed on the Lord's Day commonly called Sunday*), this enactment is one of the principal statutes in the history of English Sunday observance legislation which remained in force up until 1969. Indeed, the English Act of 1677 was the principal Sunday observance legislation in force in Upper Canada until 1845, and the 19th century legislation in most of the Canadian provinces, including Ontario, drew heavily from it.

As the principal legislation of the age, the *Sunday Observance Act* of 1677 purported to secure the observance of the Lord's day by prohibiting any person from engaging in "any worldly labour or business or work of their ordinary calling" upon that day, except for "works of necessity and charity". Similarly, the Act forbade the showing or holding out for sale of any goods. Travelling was proscribed for drovers, horse-courers, wagoners, butchers and higlers (pedlars), nor were they allowed to go into any inn or lodge upon the Lord's day. Travelling for any person on a boat was prohibited on Sunday except upon some extraordinary occasion allowed by a Justice of the Peace. In addition to the exceptions for "works of necessity and charity", the Act permitted the preparing of meat in families or dressing or selling of meat in inns and restaurants, and also the crying or selling of milk before 9 a.m. or after 4 p.m. on Sundays. There was a limitation period of ten days for prosecutions under this Act, and also a prohibition against serving or executing most forms of legal process on Sunday.

A law similar to the *Sunday Observance Act* of 1677 was passed for Ireland in 1695 under William III.⁵⁴ There was a general prohibition against Sunday travel and many boisterous games, although the law contained a substantial number of exceptions.

⁵² Holmested, *op. cit.*, p. 28, fn. (a).

⁵³ *An Act for the Better Observation of the Lord's Day, commonly called Sunday, 1677*, 29 Car. 2, c. 7.

⁵⁴ 1695, 7 Will. 3, c. 17.

The 1677 Act was later modified in 1710 by an Act⁵⁵ which permitted licensed hackney-coachmen, or their drivers, or any chairmen, to ply and stand with their coaches and chairs on Sunday.

While the Act of 1677 was obviously less repressive than the Puritan legislation, other legislation under the restored Stuarts continued many of the compulsory aspects of religious observance favoured by the Puritans. For example, the *Conventicle Act*⁵⁶ of 1664 forbade meetings of five or more persons for religious purposes other than those of the Church of England. And the *Toleration Act*⁵⁷ of 1689 continued the law compelling Sunday attendance at church, although allowance was made for attendance at churches other than those of the Church of England provided they were of a Protestant persuasion. Indeed, most of the disabilities imposed on Catholics in this period remained until the second quarter of the 19th century when they were removed by *An Act to Repeal Certain Penal Enactments made against Her Majesty's Roman Catholic Subjects*⁵⁸ in 1844.

It should not be thought that the only purpose of the seventeenth century legislation in England was to promote religious observance. Blackstone, writing in his famous Commentaries, articulated the health and welfare aspects of the *Sunday Observance Act* of 1677 and related legislation in force at that time:

. . . [B]esides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker.⁵⁹

The next major piece of legislation was an Act under George III in 1780, entitled *An Act for Preventing Certain Abuses and Profanations on the Lord's Day called Sunday*.⁶⁰ This Act dealt with public entertainments for an admission fee on Sunday, and for Ontario is perhaps the most significant of all the English legislation discussed in that it remained in force in this province right up until 1948 when it was repealed by the Parliament of Canada.⁶¹

⁵⁵ 1710, 9 Anne, c. 23.

⁵⁶ 1664, 16 Car. 2, c. 4.

⁵⁷ 1689, 1 Wm. & Mary, c. 18.

⁵⁸ 1844, 7 & 8 Vict., c. 102.

⁵⁹ IV Blackstone Commentaries (1897. Lewis ed.), p. 63.

⁶⁰ 1780, 21 Geo. 3, c. 49.

⁶¹ *An Act to Amend the Lord's Day Act*, S.C. 1948-49, c. 58, s. 2.

The Act of 1780, in specific terms, sought to prevent the use of:

... [A]ny house, room or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money . . .

It was recited in the preamble to the Act that under the pretence of inquiring into religious doctrines and explaining texts of Holy Scripture, debates had frequently been held in certain houses, rooms or other places within London or Westminster on the evening of the Lord's day by persons unlearned and incompetent to explain the same, to the corruption of good morals and to the great encouragement of irreligion and profaneness. The Crathorne Report in 1964 explained that the chief concern of the Parliament was to suppress the "disputing societies". Clearly, there was an inference that the prohibited activities were in some way considered improper or undesirable in themselves, quite apart from the observance of Sunday. Given the long hours of work and the absence of a Saturday holiday on which working people could assemble, this law would certainly have inhibited the growth of working-class political movements by denying those persons access to group assemblies and resulting revenues on their one free day each week. The fine of two hundred pounds for the keeper of any such house, room or place violating the Act was far out of line with all the other Sunday observance penalties, save those directed towards political repression.

The Act of 1780 also rendered presiding officers, ticket vendors, managers, etc. liable to prosecution and a fine of fifty pounds if they were also involved in the unlawful public entertainment; those advertising the prohibited events were also subject to a penalty. And to prevent dubious circumventions of the Act, it was provided that any house, room or place at which any tea, coffee or other refreshments of eating or drinking were offered on the Lord's day at greater prices than usual for days during the week would also be in violation of the Act. Neither could the house or room of public entertainment be financed by public subscription or contribution. Finally, there was a limitation period of six months from the commission of the alleged offence for prosecutions under the Act.

It was not until 1788 that English Parliament enacted Sunday legislation which could be said to be primarily directed towards labour conditions rather than religious observance. *An Act for the Better Regulation of Chimney Sweepers, and their Apprentices*⁶² was passed in an effort to control the conditions of employment in this particular occupation. Each prospective apprentice (between the age of 8 and 16) was to be examined and inspected before two or more Justices of the Peace, and his relationship with his master was to be determined and governed by a form of indenture specifically set out as a schedule to

⁶²1788, 28 Geo. 3, c. 48.

the Act. In the indenture (to be executed by the parent or guardian of the prospective apprentice and the master chimney sweeper), the master obligated himself to:

... cause the said apprentice to be thoroughly washed and cleansed from soot and dirt, and shall and will require the said apprentice to attend the public worship of God on the Sabbath Day, and permit and allow him to receive the benefit of any religious instructions; and that the said apprentice shall not wear his sweeping dress on that day.

However, it should be noted that the *Act relating to Chimney Sweepers and their Apprentices* was specifically made applicable only to the Kingdom of Great Britain, and not to any of Her Majesty's colonies.

Legislation prohibiting or regulating the baking of bread on Sunday has a relatively long history in England. In 1794, bakers were apparently carrying on business as usual on Sundays, under the exception of "necessity and charity" in the 1677 *Sunday Observance Act*. Parliament attempted to curtail this activity by enacting *An Act for the Better Observation of the Lord's Day, by Persons Exercising the Trade of Bakers*.⁶³ This Act forbade the baking or sale of bread or the carrying on of the trade or calling of the baker on the Lord's day in London, or within twelve miles thereof, under penalty of ten shillings. Excepted from the prohibition was the baking of meat, puddings or pies between the hours of 9 a.m. and 1 p.m., as long as the person requiring the baking thereof carried or sent the same to and from the place where such meat, puddings or pies were baked.

The *Baking Act, 1819*⁶⁴ enacted some liberal modifications to the earlier Act of 1794 insofar as it provided an exception to the prohibition against the Sunday sale of all forms of bread for "travellers, or in cases of urgent necessity". The open hours on Sunday for the baking or delivering of meat, pudding, pies, tarts or victuals were extended to any time before 1.30 p.m. on that day as long as they were not brought to or taken from any bake house during the time of divine service in the church or parish where the bake house was situated, nor within one quarter hour of the commencement thereof. An additional exception from the prohibition was made for setting the sponge on Sunday to prepare for the next day's baking.

Under the baking legislation of both 1794 and 1819, there existed the first provisions granting commercial shops an exemption from general closing laws to cook food brought to them by the customer and later returned to the customer for consumption.

These Acts were slightly amended in 1821⁶⁵ and 1822⁶⁶ retaining basically the same prohibitions and exceptions. In 1836, the same

⁶³ 1794, 34 Geo. 3, c. 61.

⁶⁴ 1819, 59 Geo. 3, c. 36.

⁶⁵ 1821, 1 & 2 Geo. 4, c. 50.

⁶⁶ 1822, 3 Geo. 4, c. 106.

general prohibitions before 1.30 p.m. were extended to the rest of the country outside of London.⁶⁷ The general prohibition against Sunday baking has gradually been removed,⁶⁸ but the prohibition against sale and delivery still prevails unless the bakery has obtained a partial exemption order from a local authority, allowing the sale of bread up until 10 a.m. on Sunday.⁶⁹

The *Game Act, 1831*⁷⁰ made it an offence to kill or take any game on Sunday or use any dog, gun, net or other engine or instrument for the purpose of killing or taking any game on that day. This provision was included along with a number of other provisions relating to days and seasons during which game should not be killed. This Act was eventually made less stringent in respect of game birds, except for those in Scotland and in certain prescribed areas for which the strict Sunday prohibition continued.⁷¹

With the advent of the industrial revolution at the beginning of the 19th century, and the resulting long hours of work common among the people of England, the demand for Sunday shopping increased. The Crathorne Report⁷² notes that many English workers during this period did not receive wages until late on Saturday night and that many, for lack of domestic storage, were forced to buy perishable food on Sunday. The fine of five shillings fixed in the 1677 *Sunday Observance Act* was no longer a deterrent to traders, and those who would otherwise have wished to observe Sunday as a day of rest were forced to keep their shops open to compete with those who found it worthwhile to contravene the law. Little attempt was made to check the increased Sunday trading in contravention of the 1677 Act until 1871 when the Reverend B. Wright of Hull, acting as a common informer, instituted numerous prosecutions against small shopkeepers. When an unsuccessful attempt was made in Parliament to repeal the Act of 1677, the government of the day secured the passage of a compromise Bill, the *Sunday Observation Prosecution Act, 1871*⁷³ which provided that prosecutions could be instituted only with the consent in writing of a chief constable or two Justices of the Peace or a stipendiary magistrate, and that no prosecution could be heard before the Justices with whose consent it was brought. This Act continued in force in England until it was repealed in 1969;⁷⁴ it is doubtful on its face whether it was ever in force in Canada, although the Act of 1677 certainly was, at least for a time during the pre-Confederation period.

The last piece of English legislation in the 19th century was the *Public Health Amendment Act, 1890*⁷⁵ which took a reverse approach from most examples of Sunday legislation in that it created a duty

⁶⁷The *Baking Act, 1836*, 6 & 7 Will. 4, c. 37.

⁶⁸See the *Baking Industry (Hours of Work) Act, 1954*, 2 & 3 Eliz. 2, c. 57, s. 12.

⁶⁹See the *Shops Act, 1950*, 14 Geo. 6, c. 28, s. 48 (and Schedule 6).

⁷⁰1831, 1 & 2 Will. 4, c. 32, s. 3.

⁷¹*An Act to Amend the Law relating to the Protection of Birds, 1954*, 2 & 3 Eliz. 2, c. 30.

⁷²See pp. 4-5, paras. 13-14.

⁷³1871, 34 & 35 Vict., c. 87.

⁷⁴*The Statute Law (Repeals) Act, 1969*, 17 Eliz. 2, c. 52.

⁷⁵1890, 53 & 54 Vict., c. 59.

on public authorities to provide certain services on Sunday. Specifically, the Act, while allowing an urban authority to close any park or pleasure ground to the public for up to 12 days per year for the use of any public charity or fair, etc., also provided that no such park or pleasure ground should be closed on any Sunday or public holiday.⁷⁶ However, like other legislation passed by English Parliament in the 19th century on this subject, it is doubtful if it was ever applied to Upper Canada or Ontario in the absence of a specific provision in the English Act extending its provisions to the colonies or Dominions.

English Sunday observance legislation in the 20th century is discussed along with the present Sunday observance laws in that country in Appendix III.

⁷⁶*Ibid.*, s. 44 (1).

APPENDIX III

PRESENT SUNDAY OBSERVANCE LAWS IN OTHER JURISDICTIONS

S U M M A R Y

A. OTHER CANADIAN PROVINCES

1. Alberta
2. British Columbia
3. Manitoba
4. New Brunswick
5. Newfoundland
6. Nova Scotia
7. Prince Edward Island
8. Quebec
9. Saskatchewan

B. OTHER COUNTRIES

1. England
2. Australia
 - (a) New South Wales
 - (b) Queensland
 - (c) South Australia
 - (d) Tasmania
 - (e) Victoria
3. New Zealand
4. United States of America
 - (a) California
 - (b) Louisiana
 - (c) Michigan
 - (d) New York

A. OTHER CANADIAN PROVINCES

1. *Alberta*

*The Alberta Lord's Day Act*¹ of 1969 takes advantage of the "opt out" provisions of the federal *Lord's Day Act* in much the same fashion as *The Lord's Day (Ontario) Act*. It allows any municipal council by bylaw to permit the following activities after 1.30 p.m. on Sundays: (1) any game, contest or sport; (2) any exhibition of an educational, artistic or cultural nature; (3) any theatrical performance, concert, recital, lecture or other performance; and (4) any exhibition of moving pictures. Horse races, dog races, boxing contests and wrestling exhibitions are specifically excluded.

Municipal bylaws permitting any or all of the above activities in the whole or part of the municipality may be passed by the

¹S.A. 1969, c. 66.

municipal council on its own motion. When the council proposes to pass such a bylaw, it must, after giving first and second reading, twice publish a notice stating the purpose of the bylaw and allow fifteen days after last publication for any petition calling for a vote of the electors to be presented, failing which the proposed bylaw may be given third reading and passed.

A petition signed by at least 10% of the electors or 2,000 electors (whichever is the lesser) can be presented to the municipal council requesting it to pass, amend or repeal a Sunday bylaw. The council then is required to give first and second reading to the bylaw requested in the petition and to publish twice a notice stating the purpose of the bylaw, allowing fifteen days for any petition for a vote, failing which the proposed bylaw may be given third reading and passed.

A municipal council may not, of its own motion, repeal a Sunday bylaw, but must await the submission of a petition as above. Any bylaw submitted to a vote must be passed if given the support of a majority of electors voting. If the bylaw fails to achieve majority support, no similar Sunday bylaw may be passed for three years. Similar provisions exist concerning the repealing of a Sunday bylaw.

*The Municipal Government Act*² contains ancillary Sunday provisions under which a municipal council is permitted by bylaw to require that during the whole or part of any "holiday" (which term includes Sunday in *The Interpretation Act*), all shops, businesses and industries or specified classes thereof be closed and remain closed on that day. Fines not exceeding \$100 and costs may be imposed for the breach of a bylaw, the non-payment of which may result in imprisonment for a period not exceeding sixty days. The municipal council can prescribe in the bylaw the manner in which premises are to be kept closed. Specifically exempted from any closing bylaw are fairs and exhibitions, bazaars for charitable and church purposes, shops carrying on the post office business, shops selling medicines and medical and surgical appliances, shops selling intoxicating liquors in the manner prescribed by law, shops selling refreshments for consumption on the premises, shops selling tobacco or newspapers, and the ordinary business of a railway bookstall or refreshment room.

Provision is also made under *The Municipal Government Act* for a municipal council to pass bylaws prescribing hours of any day of the week when garages, filling stations, service stations, machine shops and implement shops should be closed, and also providing for a rotational system and sales in emergency situations. Further variations from the norm are permitted in respect of garages, filling stations and service stations whereby a municipal council can permit in any area of the municipality a varying number of premises if the needs of the travelling public require it.

²S.A. 1968, c. 68, ss. 231-236.

Hunting of any big game or game bird is prohibited on Sunday under *The Game Act*.³ Also, under *The Billiard Rooms Act*,⁴ billiard rooms are required to close from 11.30 p.m. Saturday to 7 a.m. Monday except as permitted by municipal bylaw after 1.30 p.m. Sundays.

Contracts made on Sunday for the sale or purchase of any real property are rendered null and void by *The Land Titles Act*.⁵ Also, contracts made on Sunday for the purchase or sale of personal property are null and void by *The Sale of Goods Act*.⁶

*The Railway Act*⁷ prohibits the Sunday operation of any street railway or tramway by any company or municipal corporation except for any work of necessity such as keeping the track clear of ice and snow. However, this prohibition does not apply to the cities of Calgary and Edmonton, where the ratepayers of these cities determine by majority vote that Sunday operation is to be permitted.

Finally, *The Labour Act*⁸ requires an employer to allow each of his employees twenty-four consecutive hours of rest immediately following each period of not more than six consecutive days of work. Exceptions are permitted by order of a Board upon the application of an employer and an order may provide for consecutive rest periods in relation to a work period of four weeks or such other work period as the Board deems proper. *The Labour Act* does not single out Sunday for special treatment.

2. British Columbia

The English law of Sunday observance as of 1858 still prevails in the province of British Columbia.⁹ This fact is confirmed by the *Sunday Observance Act*¹⁰ of that province which specifically lists the English *Sunday Observance Acts* of 1625,¹¹ 1627¹² and 1677¹³ and the *Sunday Fairs Act* of 1448¹⁴ (as amended in 1850 to remove the exception of four Sundays in harvest from the prohibition¹⁵) as part of provincial law. These laws were reviewed in detail in Chapter 3 and Appendix II and need not be repeated here except to point

³R.S.A. 1955, c. 126, ss. 29, 42; amended by S.A. 1963, c. 71, ss. 8, 11.

⁴R.S.A. 1955, c. 22; amended by S.A. 1962, c. 3; further amended by Bill 135, 1970, s. 2.

⁵R.S.A. 1955, c. 170, s. 67.

⁶R.S.A. 1955, c. 295, s. 5.

⁷R.S.A. 1955, c. 276, s. 246.

⁸R.S.A. 1955, c. 167, s. 16; amended by S.A. 1957, c. 38, s. 9.

⁹The *English Law Act*, R.S.B.C. 1960, c. 129, makes the civil and criminal laws of England as they existed on November 19, 1858 in force in all parts of the province.

¹⁰R.S.B.C. 1948, c. 318. This statute, while not included in the Revised Statutes of British Columbia, 1960, is still in force. It was first enacted on May 18, 1863 as a proclamation of the Governor of British Columbia and carried forward to the 1948 Revised Statutes.

¹¹1625, 1 Car. 1, c. 1.

¹²1627, 3 Car. 1, c. 1.

¹³1677, 29 Car. 2, c. 7.

¹⁴1448, 27 Hen. 6, c. 5.

¹⁵1850, 13 & 14 Vict., c. 23.

out that they go to great lengths to prevent profanation of the Lord's day by prohibiting a broad range of both vocational and recreational activities. The Act of 1677 also makes void the service or execution of any writ, process or warrant on Sunday, and renders the person so serving or executing liable in damages. Another early English statute in force in British Columbia, but not referred to in Chapter 3 or Appendix II is that portion of the English game laws which forbids the killing or hunting for game on Sunday or Christmas day, under a penalty of a fine and costs.¹⁶

Aside from the federal *Lord's Day Act* and the early English statutes referred to above, there are no provisions for municipal shop closing bylaws pertaining to Sunday. However, the *Municipal Act*¹⁷ (applying to all municipalities except Vancouver) and the *Vancouver Charter*¹⁸ (applying to Vancouver) authorize municipal shop closing bylaws in respect of certain statutory holidays and evenings. Exemptions from these provisions include barbers or hairdressers attending a customer in the customer's residence, pharmacies, tobacco shops and newsstands, fruit and vegetable shops, florists, confectioneries, automobile dealers and service stations, hotels, inns, public houses, restaurants and refreshment houses, marinas and boat service stations. However, these shop closing bylaws do not usually extend to Sundays.

Sunday recreation entertainment and culture is dealt with at the municipal level through provision for permissive bylaws which are exceptions from the federal prohibitions, as in Ontario. The *Municipal Act*¹⁹ provides that notwithstanding the B.C. *Sunday Observance Act* or any other statute or law of the province, a municipal bylaw (in a municipality other than Vancouver) approved by three-fifths of the electors who vote on the bylaw may permit any public sport or entertainment for a price after 1.30 p.m. However, horse racing is specifically excluded from these provisions.

The *Vancouver Charter*²⁰ provides that a municipal bylaw of the Vancouver City Council may permit any public game or sport for a price (except horse racing) between 1.30 p.m. and 6.00 p.m. on Sunday; while it is not necessary to submit such a bylaw for approval of three-fifths of the electors voting, it cannot be repealed until a majority of the electors voting have indicated they are in favour of repeal. There is an alternative method of initiating a repeal vote if at least 10% of the electors sign and request a petition requesting the repeal.

The *Vancouver Charter*²¹ also permits the Vancouver City Council to pass a bylaw permitting motion pictures, theatrical performances, concerts, lectures or any other exhibitions or performances for a fee after 1.30 p.m. on Sunday. The Vancouver bylaws may specify a part or parts of the municipality in which the permission is to apply,

¹⁶ 1831, 1 & 2 Will. 4, c. 32.

¹⁷ R.S.B.C. 1960, c. 255, ss. 857-865.

¹⁸ S.B.C. 1953, c. 55, s. 279A.

¹⁹ R.S.B.C. 1960, c. 255, s. 210A; amended S.B.C. 1969, c. 21, s. 6.

²⁰ S.B.C. 1953, c. 55; amended S.B.C. 1958, c. 72, s. 14 by adding s. 206A.

²¹ *Ibid.*, amended S.B.C. 1963, c. 60, s. 5, adding s. 206B.

may specify the times provided they are after 1.30 p.m., and may distinguish between activities within a category and permit different activities in different parts of the city. The bylaws of other municipalities (under the *Municipal Act*) are to be in force throughout the municipality and cannot be subdivided in this manner.

Under the *Vancouver Charter* and the *Municipal Act*, respectively, Vancouver and Victoria have enacted bylaws permitting football, baseball, hockey and motion picture theatres.

Finally, it should be noted that statutes regulating certain types of businesses prohibit trade on Sundays, such as the *Poolrooms Act*²² and the *Government Liquor Act*.²³ These types of statutes typically prohibit business on any "holiday" (which term includes Sunday according to the *Interpretation Act*²⁴).

3. Manitoba

*The Lord's Day (Manitoba) Act*²⁵ takes advantage of the "opt out" provisions of the federal *Lord's Day Act* like most of the other provinces by allowing any municipality by bylaw to permit the following activities after 1.30 p.m. on Sundays: (1) any game, contest or sport; (2) any exhibition of moving pictures; and (3) any theatrical performance, concert, recital, lecture or other performance. Horse races, automobile races, motorcycle races, boxing contests and wrestling or judo exhibitions are specifically excluded from these permitted activities.

The Act specifically permits the Crown, the Corporation of Greater Winnipeg, any municipality, parks board or community centre to operate golf courses, skating rinks, curling rinks, swimming pools, zoos, tennis courts, parks and lawn bowling greens for a price on Sunday. Also the Act makes it lawful for any person to operate passenger excursions to summer resorts, beaches or camping grounds within the province for a price.

Municipal bylaws permitting any or all of the above activities in the whole or part of the municipality can be proposed by the municipal council on its own motion (only during the first twelve months of the Act coming into force) or upon receipt of a petition signed by at least 20% of the resident electors within the part of the municipality to be affected (at least 200 electors in local government districts). First and second reading of the bylaw is given and then a vote must be taken by the resident electors at the next municipal election. If the bylaw is approved by a majority of the resident electors voting it then becomes law. Bylaws to amend existing Sunday bylaws so as to increase or decrease the number of permitted activities or to extend or abridge the time for permitted activities do not require a petition from at least 20% of the electors, but may be submitted to them for a vote by the municipal council on its own motion.

²² R.S.B.C. 1960, c. 290.

²³ R.S.B.C. 1960, c. 166, s. 10.

²⁴ R.S.B.C. 1960, c. 199, s. 24(1)(s).

²⁵ R.S.M. 1970, c. L200.

A Sunday bylaw cannot be repealed for at least three years after its enactment and the municipal council must await receipt of a 20% petition before submitting the repeal question to the electors for a vote.

*The Shops Regulation Act*²⁶ provides authority for a municipal council to enact bylaws providing for the closing of any class of shops for one day per week. Also it permits a municipal council to implement by bylaw a rotational system for gasoline service stations during the hours stipulated in the bylaw. Bylaw No. 17481 of the City of Winnipeg requires every gasoline service station to close between 7 p.m. Saturday and 6 a.m. Monday.

*The Wildlife Act*²⁷ makes it an offence to hunt or kill a wild animal on Sunday except for those persons who hold a valid trapping licence or those persons who hunt or kill a predator in a predator control area.

*The Billiard and Pool Rooms Act*²⁸ prohibits billiard, pool or bagatelle rooms in unorganized territory in Manitoba from opening between 10 p.m. Saturday and 7 a.m. Monday.

*The Employment Standards Act*²⁹ requires every employer in specified larger municipalities to provide every employee employed in his plant with a rest period of twenty-four consecutive hours in every seven days, "wherever possible . . . on a Sunday". Exemptions from this requirement may be granted by the Minister of Labour where it would cause an undue hardship to the employer.

4. *New Brunswick*

The present New Brunswick *Lord's Day Act*³⁰ was enacted in 1967 following public hearings and the submission of a report by a Select Committee of the Legislature on the *Lord's Day Act* in 1965-66. New Brunswick is unique among the provinces in that the provisions in its *Lord's Day Act* which "opt out" from the prohibition in the federal *Lord's Day Act* do so on a province-wide basis rather than through municipal "permitting" bylaws. Also the list of Sunday activities permitted throughout the province is much more detailed and specific than that usually found in the legislation of other provinces.

The Sunday activities permitted under the legislation are (1) any game, contest, or sport (except pari mutuel betting at horse races); (2) any exhibition of moving pictures; (3) any theatrical performance, concert, recital, lecture or other performance; (4) any exhibition of an educational, artistic or cultural nature; (5) automatic laundries; (6) garages and motor vehicle stations; (7) greenhouses; (8) seasonal stands for the sale of farm produce, dairy products, seafood or Christmas trees; (9) souvenir and novelty establishments; (10) passenger

²⁶ R.S.M. 1970, c. S110, ss. 5, 6.

²⁷ R.S.M. 1970, c. W140, s. 15.

²⁸ R.S.M. 1970, c. B30, s. 6(1).

²⁹ R.S.M. 1970, c. E110, s. 36.

³⁰ S.N.B. 1967, c. 16.

excursions for a price; (11) processing plants handling farm produce or products of the sea; (12) continuous operation industries; and (13) food stores and canteens employing no more than three persons (including the owner or proprietor). In the case of continuous operation industries and food stores and canteens, a permit (licence) must first be obtained from the Minister of Justice before a person can engage in those designated activities on Sunday. Application for a permit is made to a Board whose members have the power of Commissioners appointed under the *Inquiries Act* and who may recommend to the Minister that a permit be issued subject to stipulated conditions which the Minister may not alter without consulting the Board. The Minister may also cancel or suspend a permit upon recommendation of the Board.

In addition to fines ranging from \$10 to \$500 and a maximum six month imprisonment for a violation of the provincial *Lord's Day Act*, the permit held by the accused *must* be cancelled by the convicting judge, and application for a new permit cannot be made until after six months from the date of conviction.

The Lieutenant-Governor in Council is empowered to make regulations prescribing the conditions, times and fees for permits granted by the Minister on the recommendation of the Board. Also the Act specifically permits the Sunday operation of eight industries: (1) pulp and paper; (2) oil refining; (3) mining, concentrating and smelting; (4) sugar refining; (5) shipping and navigation; (6) ship repairing; (7) telecommunications; and (8) commercial fishing operations; and permits the Lieutenant-Governor in Council to prescribe additional industries.

Finally, the Act makes it an offence for any person who engages another person to perform the permitted activities listed above to discriminate against that other person who, by virtue of his faith, does not wish to work on Sunday.

The *Game Act*³¹ makes it an offence to hunt or kill any game or fur bearing animal on Sunday or to carry a gun or other firearm in any forest, wood or resort of game on Sunday.

The *Municipalities Act*³² allows a municipal council to make bylaws requiring retail establishments to be closed during the whole or any part of any specified day. However, any such bylaws requiring Sunday closing in certain classes of stores are subject to the overriding provisions of the New Brunswick *Lord's Day Act* insofar as that latter Act permits certain activities on Sunday throughout the province "notwithstanding any bylaws of a city, town or village to the contrary".³³

³¹R.S.N.B. 1952, c. 95, ss. 36(a), 37(f).

³²S.N.B. 1966, c. 20.

³³S.N.B. 1967, c. 16, s. 2(1).

5. *Newfoundland*

There is no Lord's day statute as such in Newfoundland. However, shop closing and employment on Sunday is dealt with on a secular province-wide basis in *The Hours of Work Act*³⁴ which covers shop closing and employment on statutory holidays and hours of work generally. The Act prohibits shop openings and the employment of sales and office staff on Sunday and on twelve other statutory holidays proclaimed by the Lieutenant-Governor in Council. Each municipal council may designate one additional holiday each year for observance by shops in that municipality. Sales and office staff must be given one full day off in each week in addition to Sunday except in weeks when statutory holidays occur (except for five of the twelve statutory holidays when sales and office staff must be given Sunday, the holiday and one additional day).

Shops whose principal trade or business consists of the sale of one or more of a detailed list of twenty-five classes of goods are exempted from the above requirements as long as they do not sell on the restricted days any articles other than those in the specified classes.

The specified classes of goods permitted to be sold on the restricted days are as follows:

1. Refreshments and meals for consumption on the premises.
2. Milk (whole, powdered, evaporated or condensed), cream, eggs, yeast, bread, butter, tea, coffee, sugar, salt and pepper.
3. Cakes, pastries, biscuits (plain or fancy), baked products and the like.
4. Fruits and vegetables not tinned, bottled or otherwise preserved.
5. Chocolates, chocolate bars, candies, confectionery and ice cream.
6. Soft drinks and aerated waters.
7. Medicines (either patent or on prescription) bandages and dressings, pharmaceutical supplies, medical, dental and surgical supplies, insect repellents, suntan lotions and the like.
8. Dietetical and nursing, etc., supplies for infants.
9. Cosmetics.
10. Shaving supplies.
11. Hairdressing supplies.
12. Newspapers, magazines, periodicals, books of the pocket size, soft covered variety, writing materials and greeting cards.
13. Cigars, cigarettes, tobacco, cigarette papers, matches, lighter fluids, lighter flints and other smokers' requisites.
14. Photographic film and flash bulbs and batteries for cameras.
15. Replacement tubes and batteries for radios and replacement tubes for television sets.

³⁴S.N. 1963, c. 69, ss. 4, 5, 13; amended S.N. 1965, c. 1; amended S.N. 1966, c. 77; amended S.N. 1968, c. 46.

16. Fuels and parts for lighting, heating and cooking units including electric light bulbs and electrical fuses.
17. Candles.
18. Needles, threads and other sewing requisites.
19. Supplies and accessories for motor vehicles, cycles, aircraft and boats of all kinds (excluding pleasure boats).
20. Supplies and equipment for commercial fishing purposes (excluding food supplies save as otherwise specified in this Schedule).
21. Feeds, seeds, fertilizers and insecticides for commercial farming purposes.
22. Funeral supplies and equipment.
23. Floral bouquets and the like.
24. Pens, pencils, inks, exercise books and similar school supplies.
25. Such other articles as the Lieutenant-Governor in Council may by order from time to time prescribe.

Further exemptions are provided for selling any article required by reason of a case of illness or death or other emergency, or for supplying victuals, stores or other necessities for a ship immediately upon her arrival in port or to expedite her departure. Also, a stipendiary magistrate or welfare officer or a member of the Royal Canadian Mounted Police may give a one-day permit to any shop to open on any of the restricted days for the purpose of supplying necessities in cases where it is deemed desirable in the public interest to do so.

Penalties for violations of the Act are set at maxima of \$25 for first offence, \$50 for second offence, and \$250 for third and subsequent offences, in default of which the convicted person is liable to imprisonment for seven days (fourteen days for default of fine on third and subsequent offences). Occupiers, managers, agents and servants are all liable to these penalties if found in violation of the Act.

*The St. John's Garage and Service Station (Sunday Closing) Act*³⁵ prohibits all garages or service stations in the municipality of St. John's from opening on Sunday for repairing or servicing motor vehicles or for selling motor vehicle parts or accessories. Also it prohibits employment in such establishments except for the purpose of selling gasoline or oils. Exceptions may be granted from these prohibitions by a stipendiary magistrate or the Chief of Police by means of a permit.

*The Barbers and Hairdressers Shop Closing Act*³⁶ requires all such establishments to close on Sundays and twelve other statutory holidays proclaimed by the Lieutenant-Governor in Council. The Act applies in the city of St. John's and within six miles thereof,

³⁵R.S.N. 1952, c. 271, ss. 3, 5.

³⁶S.N. 1964, c. 77, ss. 4, 9, 10; amended S.N. 1965, c. 33; amended S.N. 1966, c. 76; amended S.N. 1969, c. 45.

in the town of Mount Pearl, and in every other area of the province which the Lieutenant-Governor in Council so designates. The Lieutenant-Governor in Council may also suspend the operation of the Act at the request of the municipal council of St. John's.

There is no statute in Newfoundland which "opts out" of the federal *Lord's Day Act* by permitting various forms of recreation, entertainment and culture which are otherwise prohibited. Indeed, *The Nuisances and Municipal Regulations Act*³⁷ provides:

All persons violating the Sunday by playing any game to the annoyance of their neighbours or of the public, and all persons found conducting themselves in a disorderly manner, may be arrested by the police and taken before the said Magistrates, either or any of them, and by him or them tried in a summary manner, and if convicted shall be liable to a fine not exceeding fifty dollars, or imprisonment for a period not exceeding ten days.

*The Wildlife Act*³⁸ authorizes the making of regulations to prohibit or control the carrying of firearms or ammunition on Sundays or to prohibit or control the taking of dogs into areas frequented by wildlife and the use of dogs in such areas on Sundays.

Finally, *The Weekly Day of Rest Act*³⁹ requires every employer to allow his employees a rest period of at least twenty-four consecutive hours in every seven days, "wherever possible . . . on a Sunday". Temporary thirty-day exemptions from this requirement may be granted by the Minister of Labour in cases of accident, urgent work, abnormal pressure or work and danger of loss of perishables, but compensatory periods of rest must be allowed.

6. Nova Scotia

The *Lord's Day (Nova Scotia) Act*⁴⁰ is a comprehensive "opting out" statute which permits and regulates three categories of activities which would otherwise be prohibited by the federal *Lord's Day Act*. The first category, applying throughout the province, includes any public game or contest or performance or public meeting for a price after 2 p.m. Also included throughout the province are Sunday passenger excursions for a price at any time. The permitted activities in this category are essentially those prohibited by sections 6 and 7 of the federal *Lord's Day Act*.

In the second category, the Act permits throughout the province Sunday selling from motor vehicle service stations (at times permitted by the *Gasoline Licensing Act*), drugstores and restaurants.

The third category includes sales and services from certain specified classes of stores or establishments upon their individually obtaining a permit from the council of the municipality in which the

³⁷R.S.N. 1952, c. 72, s. 11.

³⁸R.S.N. 1952, c. 197, s. 5.

³⁹S.N. 1969, c. 41, s. 6.

⁴⁰R.S.N.S. 1967, c. 172.

store or establishment is situated. Those classes of stores or establishments eligible to apply for permits are as follows: (1) grocery stores; (2) confectionery stores; (3) stores in which the principal business is the sale of handicrafts, novelties, souvenirs and similar articles, principally to tourists and travellers; (4) canteens or fruit stands; (5) laundromats; and (6) billiard halls or pool rooms.

A municipal council may make ordinances or bylaws to limit the number of permits that may be issued for any class of store or establishment, to prescribe (within the above six classes) the sub-classes of stores or establishments for which permits may be issued, to prescribe permitted hours, to prescribe fees for permits (not to exceed one dollar per permit), to provide for the suspension or cancellation of permits, and to prescribe the term or duration of permits.

Halifax City Ordinance No. 109, enacted in 1964⁴¹ under the authority of the *Lord's Day (Nova Scotia) Act*, authorizes the issuance of one-year permits for the operation of grocery stores, confectionery stores, souvenir and novelty shops and canteens or fruit stands between 8 a.m. and midnight on Sunday as long as each store applying for a permit has a maximum business occupancy assessment of \$9,500 as set out in the assessment role of the City for the year in which the application for such permit is made ("business occupancy assessment" is based on half the value of the premises occupied for business purposes). The issuance of one-year permits is also authorized for the operation of laundromats between 7 a.m. and midnight Sunday, and for the operation of billiard rooms and pool rooms between 2 p.m. and midnight Sunday. A permit must be displayed on the premises of the place of business for which it is issued. Permits are transferable from one location to another upon the approval of the council. The council may suspend any permit for such period of time as it deems advisable, and a permit is automatically cancelled upon its holder being convicted of a violation of the federal *Lord's Day Act*.

An early Act entitled *Of Offences Against Religion*⁴² dating back to the original Revised Statutes of 1868, last amended in 1891 and appearing last in the Revised Statutes of 1900, chapter 159, has not been repealed and therefore is still law in Nova Scotia. It provides fines for desecration of the Lord's day through shooting, gambling or sporting, frequenting tippling houses, and engaging in servile labour on that day, and also provides fines for loosing or injuring horses in the vicinity of certain religious meetings. A later amendment⁴³ added a section making it an offence under the Act to employ any person to perform servile labour on Sunday (works of necessity or mercy excepted). The minimum and maximum fines for corporations are higher than for individuals.

⁴¹ Amended in 1966, 1968 and 1969.

⁴² R.S.N.S. 1868, c. 159, ss. 2, 4, 5; amended S.N.S. 1889, c. 57; amended S.N.S. 1891, c. 32. The Act last appeared in R.S.N.S. 1900 Vol. II, p. 860.

⁴³ S.N.S. 1891, c. 32.

The *Lands and Forests Act*⁴⁴ prohibits on Sunday the hunting, taking or killing of any protected mammal or bird, or the carrying of any gun or other firearm in any place frequented by any protected mammal or bird.

Finally, the *Municipal Act*⁴⁵ authorizes a municipal council to enact shop closing bylaws in respect of "any day . . . for the entire day", but with power to exempt shops, stores or places in which goods are exposed or offered for sale by retail, the personal property in which is assessed at three thousand dollars or less. Any such bylaws enacted under the authority of the *Municipal Act* would appear to override any of the permissive sections of the *Lord's Day (Nova Scotia) Act* by virtue of the phrase "subject to any other Act of the Legislature or any bylaw, ordinance or regulation made thereunder" which appears in each of the permissive sections of that latter act.

7. *Prince Edward Island*

There is no Lord's day statute as such in Prince Edward Island. However, under *The Town Act*⁴⁶ a municipal council may enact bylaws for the good rule, peace, welfare and government of the town and for a variety of specific purposes including "enforcing the due observance of the Sabbath".

*The Fish and Game Protection Act*⁴⁷ prohibits hunting on Sunday.

8. *Quebec*

The Quebec *Sunday Observance Act*⁴⁸ attempts to take advantage of section 15 of the federal *Lord's Day Act* by declaring the Sunday observance laws of the Quebec Legislature in force on February 28, 1907 (the day before the coming into force of the federal *Lord's Day Act*) to be continued in force until amended, repealed or replaced. It also attempts to take advantage of the "opt out" provisions of the federal Act by declaring that every person is entitled to do on Sunday any act not forbidden by the Acts of the Quebec Legislature in force on February 29, 1907, and to enjoy on Sunday all such liberties as are recognized by the customs of the province.

The Act then proceeds to prohibit, except in cases of necessity or urgency, any industrial work, business or calling, theatrical performances or excursions where alcoholic beverages are sold. Fines are provided for violations. These prohibitions were declared by the Supreme Court of Canada in *Ouimet v. Bazin*⁴⁹ in 1911 to be *ultra vires* the provincial Legislature as legislation in relation to criminal law. However, they have not been removed from the statute books.

⁴⁴ R.S.N.S. 1967, c. 163, s. 155.

⁴⁵ R.S.N.S. 1967, c. 192, s. 191(90).

⁴⁶ R.S.P.E.I., 1951, c. 162, s. 78(43).

⁴⁷ S.P.E.I. 1959, c. 13, s. 40.

⁴⁸ 1964 R.S.Q., c. 302.

⁴⁹ (1911), 46 S.C.R. 502.

Additional sections in the *Quebec Sunday Observance Act* prohibit shopkeepers, pedlars, hawkers or other persons from selling goods on Sunday, but exemptions are made for articles collected from the public for churches and those destined for pious purposes, all of which may be sold on Sunday at the doors of country churches. The proceeds of fines for violations of the above prohibitions are divided equally between the person prosecuting and the Crown. Any prosecutions must be commenced within two months after the commission of the alleged offence.

An Order-in-Council promulgated on April 19, 1966⁵⁰ to implement the major recommendations of the Alleyn Royal Commission Inquiry into Sunday Observance in the Québec Pulp and Paper Industry, permits Sunday operation by those pulp and paper companies which have reached 90% of their normal capacity operating six days per week, provided that the employees affected consent and the Minister of Justice does not oppose.

A provision under the *Licences Act*⁵¹ makes it an offence for a licensed billiard table or bowling alley operator to allow any person to play billiards or bowl "at any time during Sundays".

The National Assembly of Quebec recently enacted a comprehensive statute entitled the *Commercial Establishments Business Hours Act*⁵² regulating statutory holiday and evening closings on a province-wide basis. However, the Act carefully avoids regulating Sunday hours. This Act is described in detail in Chapter 5.

9. Saskatchewan

*The Lord's Day (Saskatchewan) Act*⁵³ follows much the same pattern as its counterparts in Manitoba and Alberta. It takes advantage of the "opt out" provisions of the federal *Lord's Day Act* by permitting the following activities on Sunday: (1) any public game, contest or sport between 1.30 p.m. and 6 p.m. where the municipal council has enacted a sanctioning bylaw (horse races, dog races, boxing contests and wrestling exhibitions are expressly prohibited); (2) any live musical performance between 1.30 p.m. and 6 p.m. and after 8.30 p.m. if the sponsor is a non-profit organization whose objectives include those of a benevolent, artistic, cultural or charitable nature, if the net proceeds of the performance are used for any of the above objectives as specified in public advertisements, if no dancing is permitted by those paying to attend, and if public accounting records of the performance are kept readily available for a period of three years following the performance; (3) any moving picture for a price after 8.30 p.m.; (4) any curling rink, golf course, lawn bowling green, swimming pool, tennis court, museum, zoo, historical site, any picnic, camping, sports or park area, any sightseeing tour, visual or ceremonial display, any baseball, basketball, football, fastball, hockey or softball

⁵⁰No. 706, 1966.

⁵¹1964 R.S.Q., c. 79, s. 88(3).

⁵²1970 S.Q., c. 15.

⁵³R.S.S. 1965, c. 419; amended S.S. 1968, c. 46; amended S.S. 1969, c. 34; amended S.S. 1970, c. 41.

game, any transportation or eating facility operated by a public authority (i.e., the Crown, a municipality, Wascana Centre Authority, or a regional park authority); (5) any public game, contest or sport between 1.30 p.m. and 6 p.m. in local improvement districts (as ordered by the Minister of Municipal Affairs) or in the Northern Saskatchewan Administration District (as ordered by the Minister of Natural Resources) (horse races, dog races, boxing contests and wrestling exhibitions are expressly prohibited); and (6) sporting, ceremonial, eating and transportation facilities and the sale of athletic equipment, services, souvenirs and programmes by the Canada Winter Games Society.

Municipal bylaws permitting any public game, contest or sport in a municipality may be passed by council on its own motion or following a petition signed by at least 10% of the electors or 2,000 electors (whichever is the lesser) and specifying the public games, contests or sports to be included. However, no such bylaw has any legal effect until it has first been published in the local newspaper and then received the assent of a majority of electors who vote at the next ensuing municipal election. Similar provisions for petitions and elector assent in respect of repealing or amending bylaws exist with the additional proviso that a bylaw cannot be repealed for at least three years after it first comes into force.

With respect to public games, contests or sports in local improvement districts and the Northern Saskatchewan Administration District, no order may be made by the appropriate Minister unless a petition has been received from at least 10% or 2,000 of the electors (whichever is the lesser) of the districts concerned, and the assent of a majority of the electors who vote has been obtained.

*The Urban Municipality Act*⁵⁴ contains shop closing provisions requiring shops to be closed in every city and town throughout the province from 10 p.m. Saturday to 5 a.m. Monday. This requirement may be varied by municipal bylaw in each community by moving the 10 p.m. Saturday closing time ahead to 6 p.m. (when stores are open Thursday or Friday night), or to as early as 12 noon. An exemption is granted from the above closing requirement for a shop in which the principal trade or business carried on is one of (or a combination of) tobacconist, newsagent, refreshment house, druggist, confectionery, bakery, milk supplier, garage, filling station, gas pump, automobile dealer; or hotel or motel where one or any of these trades or businesses are carried on. Each of the trades or businesses listed is carefully defined in the legislation. The hours of operation on Sunday for exempted shops are unrestricted unless regulated by municipal bylaw. Also the goods sold or services provided are unrestricted as long as the shop sells or provides one or more of the above list as its *principal* trade or business, except that a municipal bylaw may restrict the nature of the goods sold or services provided during Sunday. No shop may qualify for an exemption unless the proprietor or manager has previously filed with the clerk of the municipality a statement in writing setting forth the principal trade or business carried on in the shop.

⁵⁴S.S. 1970, c. 78, ss. 178-188.

Municipal bylaws regulating any of the exempted shops may regulate not only the hours of Sunday opening and the nature of goods sold or services provided but they may apply only to any designated class or classes of shops and may have effect during the whole or any designated part of parts of the year. Such bylaws may be made by a municipal council on its own motion (with at least thirty days public notice) or upon petition signed by at least three-quarters of the occupiers of shops throughout the municipality belonging to the class or classes to which the petition relates. Similar provisions exist for repeal or amendment of any such bylaw except that a petition must have one-third of the occupiers of the class or classes of shops involved. The municipal council may determine the manner of the classification of shops, and its decision with respect thereto is final and conclusive and not subject to any review by any Court.

Further exemptions from the province-wide shop closing provisions include: (1) the sale of any article required for immediate use by reason of an emergency; (2) any shop selling products grown by the operator thereof on land (or receptacles on land) on which the shop is situated, provided that no goods other than such products are offered for sale in the shop; and (3) the sale of liquor in an outlet as defined in *The Liquor Licensing Act*. Sales of prohibited goods on Sundays by auctioneers or transient traders are prohibited except in the case of second-hand goods. Finally, the Act provides penalties in the form of fines not exceeding \$100, in default of which is provided the penalty of imprisonment for a term not exceeding six months.

Shop closing regulations for hamlets under *The Rural Municipalities Act*⁵⁵ may be passed by bylaw by the municipal council in a manner similar to that provided in *The Urban Municipalities Act*.

*The Protection of Game Act*⁵⁶ prohibits hunting, shooting, wounding or killing any big game or game bird on Sunday; the carrying of a gun on Sunday is *prima facie* evidence of hunting. Also, the same Act prohibits a licensed dog trainer from training dogs on Sunday.

Finally, *The Labour Standards Act*⁵⁷ provides that every employee working more than five hours per day is entitled to a rest period of at least twenty-four consecutive hours in every seven days, "wherever possible to be on a Sunday". Exemptions from this requirement may be granted by the Minister for a period not exceeding one year.

B. OTHER COUNTRIES

1. *England*

The last general statute dealing with Sunday observance in England was the *Sunday Observance Act, 1780*.⁵⁸ Since that time, however, a number of laws have been passed regulating the behaviour of various segments of the work force on Sunday, either by way of specific exception to the general Sunday law⁵⁹ or as incidental to the general

⁵⁵ R.S.S. 1965, c. 150, s. 193.

⁵⁶ R.S.S. 1965, c. 356, ss. 29, 43.

⁵⁷ S.S. 1969, c. 24, s. 16.

⁵⁸ 21 Geo. 3, c. 49.

⁵⁹ Examples of exempting legislation are the various *Baking Acts*.

regulation of industry.⁶⁰ This trend has accelerated slightly during the twentieth century. Although these statutes are primarily directed towards the regulation of labour, it would be incorrect to state that they are entirely secular in nature. That some consideration is given to the religious aspirations of those regulated is evidenced by exceptions made in favour of those of the Jewish faith.

At the turn of the century, there was fairly widespread evasion of the existing Sunday observance laws. Where prosecutions occurred, the law was strictly interpreted. For example, in 1900 it was held that barbers were not subject to the 1677 Act since they did not fall within any of the classes enumerated therein.⁶¹ On the other hand, there was a great deal of agitation for new and stricter laws regarding work on Sunday from both churchmen's and workers' associations. Bills providing for the Sunday closing of shops were introduced in 1905, 1906, 1909, 1910 and 1911. Although the Parliamentary committees considering them commented favourably upon their provisions, none was passed. A comprehensive *Shops Act* was passed in 1911, but the provisions regarding Sunday closing were dropped during its passage. This ended for some time the popular agitation for new laws.

Sunday trading continued to increase until in 1930 there were over 30,000 prosecutions as contrasted with 11,000 in 1913.⁶² During the late 1920's, a number of Private Members' bills to regulate the Sunday opening of barbers' and hairdressers' establishments were introduced and finally, in 1930, such a measure was passed.⁶³ This Act prohibited anyone from carrying on the trade of barber or hairdresser on Sunday on pain of a fine of £2 for the first offence, and £20 for subsequent offences. The only exceptions were those providing the prohibited services to passengers on a ship, residents in a hotel, or to persons unable by reason of bodily or mental infirmity to attend at the worker's usual place of business.

The Act also provided an exemption in favour of the members of the Jewish faith who preferred to celebrate the Sabbath on Saturday. Such persons were allowed to open their shops on Sunday if they were closed on Saturday, provided that they gave notice to the local authority of their intention and posted a notice concerning their hours in the shop.

In 1936, a similar statute was passed prohibiting the carrying on of the trade of butcher on Sunday and providing that butcher shops should be closed on that day.⁶⁴ It also prohibited the delivery of butcher's meat at any time when the shop must be closed, except on a Sunday that was, or immediately preceded, Christmas day. In addition, it exempted sales and delivery of meat to ships and aircraft upon

⁶⁰An example of a statute regulating industry which incidentally touches on Sunday observance is *An Act for the Better Regulation of Chimney Sweepers and Their Apprentices, 1788*, 28 Geo. 3, c. 48.

⁶¹*Palmer v. Snow* [1902], Q.B. 725.

⁶²Report of the Departmental Committee on the Law of Sunday Observance (1964; Cmnd. 2528), p. 7.

⁶³*Hairdressers' and Barbers' Shops (Sunday Closing) Act, 1930*, 20 & 21 Geo. 5, c. 35.

⁶⁴*Retail Meat Dealers' Shops (Sunday Closing) Act, 1936*, 26 Geo. 5 & 1 Edw. 8, c. 30.

arrival or immediately before departure. There was also an exception, similar to that in the Act governing barbers and hairdressers, for Jewish merchants who were licensed by the local Jewish Board to sell Kosher meat.

Later in 1936, an Act was passed that governed the general Sunday closing of shops.⁶⁵ This measure incorporated the *Hairdressers' and Barbers' Shops (Sunday Closing) Act, 1930*, and the provisions of the *Bread Acts* of 1822 and 1836, which allowed the sale and delivery of bread during certain hours on Sundays. The provision in these Acts which prohibited baking on Sundays, except for preparations for the next day's work, remained in effect.

The 1936 Act provided, generally, that all shops should be closed on Sunday and prohibited all deliveries on that day. There were many exceptions set out, however. A large number of retailers were completely exempted from the provisions of the Act. Included were shops selling intoxicating liquors, tobacco, newspapers, passport photographs, fodder and meals.⁶⁶ A smaller group, those selling bread, fish and groceries, was exempted from compliance for nine months after the coming into force of the Act. Subsequently, these shops might be able to remain open until 10.00 a.m. on Sunday morning, provided that the local authority in the area made an order to that effect. In addition, local authorities in holiday areas were entitled to allow the Sunday opening of shops selling food, books, toys, photographic equipment and fishing or swimming supplies during the holiday season. In both these cases, before making the order the local authority was required to give proper notice to those who would be affected by it and hear any objections. If two-thirds approved the proposed order, it could be implemented.

In London, the London County Council could make an order allowing shops to remain open until 2.00 p.m. on Sunday where it was shown that Sunday street markets had been commonly held, or in certain areas where Sunday closing would cause hardship to the local population. Such orders were dependent upon the agreement of the majority of shops affected.

Like the earlier Acts dealing with Sunday closing, an exception was made in favour of Jewish shopkeepers who kept the Jewish Sabbath, although the requirements involved were somewhat more stringent. In order to remain open on Sunday, it was necessary to be registered with the local authority as a Jewish merchant. This involved making an application, including a statutory declaration setting forth a conscientious objection to remaining open during the Jewish Sabbath. Registration could be revoked if it were shown that the merchant in fact worked in the shop on Saturday or that his conscientious objection was not genuine.

There were also exceptions made to the general prohibition on Sunday delivery. The first of these was where Sunday was Christmas day or the day immediately preceding it. In addition, deliveries could be made

⁶⁵*Shops (Sunday Trading Restriction) Act, 1936*, 26 Geo. 5 & 1 Edw. 8, c. 53.

⁶⁶This list is by no means exhaustive.

to clubs, ships, and aircraft arriving or departing, and in case of illness. Finally, the Act exempted, before 1.30 p.m., the cooking and delivery of food that was brought to the shop by the customer to be prepared there and consumed by him later that day. The exceptions for barbers and hairdressers found in the *Hairdressers' and Barbers' Shops (Sunday Closing Act, 1930)* were also included.

The Act also made provision for alternative holidays for those employed on Sundays. In most cases, those who worked more than four hours must be given one other day off and those working less than four hours, one half day off in addition to the weekly holiday prescribed by the *Shops Act, 1912*. This provision did not apply, however, to milk-roundsmen, post office workers, those engaged in selling liquor, or registered pharmacists. In no case might a person who was prohibited from working on Sunday by some other statute be employed in a shop that was entitled to be open under this Act.

The provisions of the *Shops (Sunday Trading Restrictions) Act, 1936*, were repealed by the *Shops Act, 1950*,⁶⁷ which dealt comprehensively with employment conditions in the retail trade and its provisions were reproduced in Part IV of that Act. It also incorporated the provisions of the *Retail Meat Dealers' Shops (Sunday Closing) Act, 1936*, which was repealed by it. One further exception was made in favour of the sale of handicrafts made by a person in his own home, where that person was dependent upon such sales for his livelihood, and in the opinion of the local authority, substantial hardship would result for him if he were unable to sell his products on Sunday.

There were general exceptions to the Sunday closing requirements, such as shops selling guidebooks, post cards, and souvenirs at public galleries, museums, and parks. When the Festival of Britain was held in 1951, an Act was passed⁶⁸ providing that shops connected with any of the Festival attractions should be considered as coming within that exception. It also provided that these attractions might remain open on Sunday whether or not they came within the terms of the *Sunday Observance Acts of 1677 and 1780*.

There is nothing that prohibits the operation of factories on Sundays in England. However, since 1878, the various *Factories Acts* have prohibited women and young persons under 18 from working on Sunday.⁶⁹ There are, of course, exceptions to this prohibition. Most relate to specific industries as where the manufacture must take place before the product spoils, such as the canning of fish and food and the treatment of milk. In addition, young men may work at repairing machinery on Sunday. There is also an exception for workers in a factory which is closed on the Jewish Sabbath and remains open on Sunday.

The *Sunday Observance Act of 1780*⁷⁰ prohibited all forms of entertainment on Sunday for which an admission fee was charged. This Act remains in force in Britain today. Subsequent legislation has set

⁶⁷ 14 Geo. 6, c. 28.

⁶⁸ *Festival of Britain (Sunday Opening) Act, 1951*, 14 & 15 Geo. 6, c. 14.

⁶⁹ *Factory and Workshops Act, 1878*, 41 & 42 Vict., c. 16, s. 21; *Factory and Workshops Act, 1901*, 1 Edw. 7, c. 22, s. 22; *Factories Act, 1937*, 1 Edw. 8 & 1 Geo. 6, c. 67, s. 77; and *Factories Act, 1961*, 9 & 10 Eliz. 2, c. 34.

⁷⁰ 1780, 21 Geo. 3, c. 49.

up only a few exceptions. This may be partly because the Act does not prevent performances before private groups such as clubs where no admission fee is charged at the time. In spite of the prohibition in the Act against free entertainments where higher than usual prices are charged for refreshments, free entertainments are not prohibited where a collection is taken up or where, as at some car rallies, a charge is made for parking.

The first Sunday entertainments allowed on a statutory basis were films. The *Cinematograph Act, 1909*⁷¹ did not expressly allow Sunday performances but gave the municipalities power to license cinemas on certain conditions.

The *Sunday Entertainments Act, 1932*⁷² expressly recognized the power of the local authority to license Sunday performances at a cinema, but it imposed conditions upon such licences. The first of these was that no one should be employed who had been employed in a similar manner for the six preceding days, whether or not he was working for that particular employer. The other was that a sum equal or proportionate to the estimated profits of the performance, according to the ruling of the local authority, should be paid to various charities and to the Cinematograph Fund. The Act also empowered the local authority to grant licences for musical entertainments on Sundays, subject to such restrictions as they saw fit. It also provided that lectures and debates could be held on Sunday and that museums, picture galleries and botanical gardens might be open to the public.

The 1780 Act also prohibited sporting events where an admission fee was charged. In addition, the *Betting and Lotteries Act, 1934*,⁷³ prohibited betting on Sunday through a bookmaker or totaliser at any race track. In 1963,⁷⁴ the Act was amended to include pool betting provided by the Totaliser Board at any race track within the prohibition.

There seems to be no ban on actual participation in sporting activities on Sunday, even though the players must pay a fee to use the equipment or grounds. There are, however, a few specific prohibitions. The playing of billiards on Sundays was forbidden by the *Gaming Act, 1845*,⁷⁵ but this prohibition was relaxed with regard to billiard tables in licensed premises by the *Licensing Act, 1961*.⁷⁶

The *Game Act, 1831*,⁷⁷ prohibited the killing of certain types of game on Sunday. This Act was altered by the *Protection of Birds Act, 1954*,⁷⁸ which made different provisions for the preservation of various classes of birds. Those listed in Schedule I could never be killed, whereas those in Schedule II might be shot at any time except Sunday in certain prescribed areas.

⁷¹ 9 Edw. 7, c. 30.

⁷² 22 & 23 Geo. 5, c. 51.

⁷³ 24 & 25 Geo. 5, c. 58.

⁷⁴ *Betting, Gaming and Lotteries Act, 1963*.

⁷⁵ 8 & 9 Vict., c. 109.

⁷⁶ 9 & 10 Eliz. 2, c. 61.

⁷⁷ 1 & 2 Will. 4, c. 32.

⁷⁸ 2 & 3 Eliz. 2, c. 30.

Generally speaking, in England judicial processes do not take place on Sunday. There has long been an exception in the case of criminal law enforcement, and recently two statutes were passed concerning children. In 1958, the *Children Act*⁷⁹ provided that on Sunday a foster child might be removed by order from those with whom he was placed. The *Adoption Act*⁸⁰ was similarly amended, providing for the removal of a "protected child" in the same circumstances.

During the 1950's, various Private Members' bills dealing with Sunday entertainments were introduced in Parliament and a number of motions for the appointment of a committee of inquiry into the matter were debated and lost. In 1961, however, a committee of inquiry was appointed under the chairmanship of Lord Crathorne, and this Committee reported in December 1964.⁸¹

The Crathorne Committee recommended little change in the law relating to the Sunday opening of shops. In particular, airport shops might open on Sunday, and an exception similar to that accorded to Jews was made in favour of Moslems, who observe Friday as a holy day. The recommendations concerning entertainment and sports were much more sweeping. The Committee felt that most forms of entertainment, except sporting events, should be allowed to take place on Sunday after 12.30 p.m. They also recommended that the "charity tax" imposed by the *Sunday Entertainments Act, 1932* should be abolished. They felt, however, that sporting matches to which the public was admitted on payment of a fee should only be permitted where the players were amateurs and not paid for their participation. So far, no action has been taken on any of these recommendations.

Another body that has investigated Sunday observance laws in England, although from a different point of view, is the Law Commission. Their study was concerned with finding those laws which were obsolete or inoperative. Their report⁸² was embodied in a draft bill presented to Parliament and later enacted in the *Statute Law (Repeals) Act, 1969*.⁸³ This measure repealed the *Sunday Fairs Act, 1448*,⁸⁴ the *Sunday Observance Act, 1625*,⁸⁵ the *Sunday Observance Act, 1627*,⁸⁶ the *Sunday Observance Act, 1677*,⁸⁷ and the *Sunday Observance Prosecution Act, 1871*.⁸⁸ In addition, those sections of modern Acts such as the *Shops Act, 1950*, the *Baking Industry (Hours of Work) Act, 1954*, the *Children Act, 1958*, and the *Adoption Act, 1958*, which provided that compliance with these statutes would not be a breach of the statutes repealed, were also repealed.

⁷⁹1958, 7 & 8 Eliz. 2, c. 65.

⁸⁰1958, 7 & 8 Eliz. 2, c. 5.

⁸¹Report of the Departmental Committee on the Law of Sunday Observance (1964; Cmnd. 2528).

⁸²Law Com. No. 22, Statute Law Revision: First Report (1969; Cmnd. 4052).

⁸³17 & 18 Eliz. 2, c. 52.

⁸⁴27 Hen. 6, c. 5.

⁸⁵1 Chas. 1, c. 1.

⁸⁶3 Chas. 1, c. 2.

⁸⁷29 Chas. 2, c. 7.

⁸⁸34 & 35 Vict., c. 87.

2. *Australia*

In Australia, laws regarding Sunday activities fall mainly within the legislative competence of the individual states. So far as we have been able to ascertain, no federal statutes have been passed concerning this matter, but a number of awards of federal labour tribunals have had the effect of overriding Sunday observance legislation. This is also true of state labour tribunal awards.

In the various states the old English statutes with regard to Sunday observance are in force except as they have been altered by subsequent laws or, as has been pointed out, by various labour tribunals.

Here follows a brief examination of the laws of the various states except Western Australia, concerning which we have no information.

(a) *New South Wales*

Aside from pawnbrokers, who are prohibited from trading on Sundays by the *Pawnbrokers Act, 1902*, the Sunday closing of shops is regulated by the *Factories, Shops and Industries Acts, 1962-1965*. These Acts generally prohibit Sunday opening but make exceptions in favour of news-agencies, restaurants, tobacconists, pharmacies and those selling fruit and vegetables, fish, flowers, baked goods, cooked provisions, petrol, and "small shops". Small shops are those in which no more than two people are employed and which sell only certain goods such as dairy products, baked goods and toiletries.⁸⁹ We are informed that a recent amendment to the Acts allows municipal authorities in holiday areas to exempt local shops from Sunday closing, but this amendment has not yet been made available to us.

Factory hours of work are regulated by awards of state and federal labour tribunals. Sunday work is often permitted under these awards, although at a higher rate of pay.

Sunday entertainment is regulated by the *Sunday Entertainment Act, 1966*. It provides that public entertainments, which include sporting events, may take place after 12.30 p.m. on Sundays, or earlier with the permission of the Minister. Spectators may be allowed into the hall or grounds where the event is to take place half an hour before its commencement. When the Minister is of the opinion that an entertainment would interfere with religious observance or create a public disturbance, he may prohibit any particular entertainment or that particular class of entertainment from taking place on Sunday. The only other restraint on sporting activities is section 53 of the *Gaming and Betting Act, 1912* which forbids race meetings on Sundays. In addition, the *Police Offences Acts, 1912-1954* prohibit the carrying and shooting of firearms on Sundays and require the Justice of certain metropolitan areas to disperse crowds which have gathered in any public place for any purpose connected with gambling.

⁸⁹ *Factories, Shops and Industries Acts, 1962-1965*, s. 76A.

Section 7 of the *Sunday Entertainments Act* specifically repeals the *Sunday Observance Act* of 1780, but the 1677 Act appears to be in force except as altered by the *Factories, Shops and Industries Acts, 1962-1965* and the various labour awards.

(b) Queensland

In Queensland the regulation of shops and factories is carried out by a combination of the *Factories and Shops Acts, 1960-1964* and the *Industrial Conciliation and Arbitration Acts, 1961-1964*. The former statute includes a list of "exempt shops" to which its provisions do not apply. Thus, these stores may be open at any time. Section 63 of the Acts provides that two-thirds of the owners of any type of exempted store in any local area may agree among themselves as to closing hours, but such agreement may be disallowed or altered by the Minister if he is of the opinion that it is not in the public interest. Exempted shops include drugstores, book stores, bakeries, restaurants, confectioneries, fish shops, gasoline pumps and undertakers.

Another category of shops that may be open on Sunday is "small shops". The definition of such shops is similar to that in New South Wales, and such shops are entitled to be open from 8 a.m. to 7.30 p.m. on Sundays. All other shops are required to close on Sunday by the *Factories and Shops Acts, 1960-1964*.

The *Industrial Conciliation and Arbitration Acts, 1961-1964* provide, however, that the Industrial Conciliation and Arbitration Commission of Queensland may fix the hours of opening and employment in all shops except those exempted under the *Factories and Shops Acts, 1960-1964*. These awards take precedence over the provisions of the last-mentioned statute and could conceivably authorize Sunday opening, although no example of this has been brought to our attention.

The same Commission, together with the Commonwealth Conciliation and Arbitration Commission, governs hours of employment and rates of pay in factories. Their awards seldom prohibit such work on Sundays, but except in service industries, usually provide for a higher rate of pay.

The *Liquor Acts, 1912-1970* prohibit the sale of alcohol on Sundays except between 11 a.m. and 1 p.m. and again between 4 p.m. and 6 p.m. for consumption on the premises. The Commission may extend these hours on application where they feel it is in the public interest in any particular district.

The regulation of entertainment is carried out by each local government under the provisions of section 30 of the *Local Government Acts, 1936-1970* which charges it with the "good rule and government" of each municipality. For example, Chapter 16 of the Ordinances of Brisbane provides that some but not all places of entertainment may be licensed to operate on Sundays. For example, a

licence to open on Sunday may be given to a theatre or sports ground, but not to a dance hall or race track.

Finally, the *Firearms Acts, 1927-1967* prohibit the carrying or shooting of firearms on Sunday.

(c) South Australia

To a certain extent the English *Sunday Observance Acts* up to 1677 are still in force in South Australia. They have, however, been altered by the provisions of the *Early Closing Acts, 1926-1960* which permit certain goods to be sold and certain stores to remain open on Sunday. Among the exempted goods are cooked foods, bread, dairy products, fruit, flowers, books, drugs, and tobacco. Drugstores, restaurants, confectioneries, flower shops, milk stores, book stores and undertakers may remain open. Public houses and licensed wine shops are entitled to remain open under this Act but the times and conditions of sale of alcohol are governed by the *Licensing Act, 1967* (No. 41).

The 1780 *Sunday Observance Act* is expressly repealed by section 3 of the *Places of Public Entertainment Act, 1967*. This Act, together with the *Places of Public Entertainment Acts, 1913-1967*, governs sports and other entertainment on Sundays. It prohibits any of these activities from taking place except in a licensed place of entertainment. On Sundays, all these places may operate after 1 p.m., but a few specific types of entertainment, mainly sports, are prohibited unless a special permit is obtained. Thus certain football, soccer and cricket matches are prohibited as well as all horse, dog and motor races, rodeos, boxing and wrestling matches. In addition, the Minister may declare any type of entertainment unlawful on Sunday. A permit for an entertainment otherwise prohibited may be obtained from the Minister, who must consider the following factors before granting it: (1) the increase in number of persons working on Sunday thereby; (2) the practice existing before the Act was passed; and (3) the disturbance caused to the locality.

(d) Tasmania

In Tasmania, the laws regulating Sunday observance were examined by a Board of Inquiry and a report, known as the Phillips Report, was issued in 1967. As a result, the *Sunday Observance Act, 1968* (No. 32) was passed and at present it controls Sunday activities in the state.

Basically, it prohibits anyone from carrying on his ordinary calling or doing any work for reward on Sundays. There is, of course, a large number of exceptions, including work in connection with religious activities, public utilities and transportation, agriculture and fishing, the provision of food in hotels and restaurants, and the sale of eggs, dairy products, baked goods, and fresh fruit, flowers and vegetables by the grower thereof.

Another exception is made in favour of sports and entertainments. Certain sporting events, however, may be prohibited by the regulations,

and regulations may impose conditions upon other forms of Sunday entertainment.

One unique feature of this statute is that it provides that where work on Sunday is permitted, it should be left to each individual to decide if he wishes to exercise the privilege. Section 8 of the Act provides that no employer shall penalize an employee for not working on Sunday and places the burden on the employer of showing that any penalty exacted was for some other reason.

(e) Victoria

In Victoria Sunday work in shops and factories is regulated by the *Labour and Industry Act, 1958*. It expressly forbids work in the clothing, textile, furniture and footwear industries on Sunday. The Act generally requires that all shops be closed on Sunday and in addition specifically prohibits butcher shops from opening on that day. On application, the Minister may grant an exemption from Sunday closing rules for a holiday resort during the season. The closing hours of certain types of shops are governed, according to location, by government regulation or local bylaws and these may provide for Sunday opening. Included in this group are bakeries, confectioneries, restaurants, fruit and flower shops, news-agents, libraries, pharmacies and undertakers.

The *Summary Offences Act, 1966* makes it an offence to publish a newspaper on Sunday and the *Firearms Act, 1958* prohibits the carrying of firearms on that day.

Sunday amusements are governed by the *Sunday Entertainment Act, 1967*. This Act provides that movies may be shown after 8.30 p.m. and absolutely prohibits any sporting event where betting takes place. Otherwise, any Sunday entertainment requires a permit from the Chief Secretary. Such permits may be for a single occasion or permit a similar entertainment each Sunday but, except in special circumstances, they do not become effective until 1.30 p.m. In granting a permit, the Chief Secretary must take into account the public interest; whether Church services are being held in the vicinity; any objection raised by the municipality; the public demand for the entertainment; and its nature and cost. Finally, this Act repeals the English *Sunday Observance Act* of 1677 in Victoria.

3. New Zealand

No single law regulates Sunday observance in New Zealand but a number of statutes touch upon the matter. Some examples are the *Distillation Act, 1908*, which prohibits fermentation on Sundays without the permission of an inspector;⁹⁰ the *Mining Act, 1926*,⁹¹ which prohibits employment in mines on Sunday except with the permission of an inspector; and the *Pawnbrokers Act, 1908*,⁹² which prohibits pawnbrokers from carrying on business on Sundays.

⁹⁰*Distillation Act, 1908*, s. 65(1); amended by the *Customs Acts Amendment, 1963*, No. 37, s. 12.

⁹¹*Mining Act, 1926*, s. 260.

⁹²*Pawnbrokers Act, 1908*, s. 31.

Sunday trading is generally regulated by a combination of the *Police Offences Act, 1927* and the *Shops and Offices Act, 1955*. The first-mentioned statute⁹³ prohibits anyone from carrying on his business or trading on Sundays. Exceptions are made in favour of works of necessity and charity; the driving of livestock; and the sale of milk, bread, agricultural products from farm premises, and medicines, surgical appliances or anything required in connection with illness. Also exempted are workers employed in the post office, newspaper production, various fields of transportation and photography, or in a shop exempted by the *Shops and Offices Act*. This Act⁹⁴ provides that every shop should be closed on Sunday. Exemptions are made if the Court of Arbitration which fixes the closing hours for each class of shops has provided for opening on that day or if the shop deals solely in exempted goods⁹⁵ which are tobacco, confectionery, milk products, motoring accessories, agricultural products sold from the farm, and newspapers.⁹⁶ In addition, specific exceptions were made for the sale from any shop of medical and surgical appliances⁹⁷ and motoring accessories⁹⁸ or the carrying out of post office business.⁹⁹ An amendment to the Act in 1959¹⁰⁰ established a Shops and Offices Exemption Tribunal which, after proper application and hearing, might make individual exemptions from the closing provisions of the Act if it felt it was in the public interest to do so.

The general prohibition against Sunday activities in the *Police Offences Act, 1927* included entertainment and sports. An exception was made in favour of concerts and other entertainments where permission had been given by the local municipal authority.

No spirits may be sold on Sunday.¹⁰¹ Beer, stout and table wine, however, may be sold with meals in licensed restaurants.¹⁰²

In general, Sunday appears to be devoted to recreational pursuits, especially sports. However, these games are of a local and amateur nature and the majority of commercial sporting events takes place on Saturdays. There are no horse race meetings or theatre performances and concerts are infrequent, though cinemas may operate in the afternoons and evenings. Commercial services are sparse, but the gasoline stations, dairies, and stores selling articles such as tobacco, cigarettes and beverages are open. Although newspapers are permitted to be sold, those published in New Zealand come off the presses late Saturday evening.

4. *United States of America*

The American law of Sunday observance was thoroughly canvassed in the Supreme Court of the United States in the following cases:

⁹³ *Police Offences Act, 1927*, s. 18.

⁹⁴ *Shops and Offices Act, 1955*, s. 3.

⁹⁵ *Ibid.*, s. 6.

⁹⁶ *Shops and Offices Amendment Act, 1965*, No. 8.

⁹⁷ *Shops and Offices Act, 1955*, s. 7.

⁹⁸ *Ibid.*, s. 8.

⁹⁹ *Ibid.*, s. 9.

¹⁰⁰ *Shops and Offices Amendment Act, 1959*, No. 14.

¹⁰¹ *Sale of Liquor Act, 1962*, s. 71.

¹⁰² *Sale of Liquor Amendment Act, 1965*, s. 2.

McGowan v. Maryland,¹⁰³ *Gallagher v. Crown Kosher Super Market of Massachusetts*,¹⁰⁴ *Two Guys from Harrison-Allentown v. McGinley*,¹⁰⁵ and *Braunfeld v. Brown*.¹⁰⁶ Justice Frankfurter speaking for himself and Justice Harlan wrote a separate concurring judgment applying to all of the above cases *sub nomine McGowan v. Maryland*. Justice Douglas dissented with a similar all-encompassing judgment.

Speaking for the majority in *McGowan v. Maryland*, Chief Justice Warren characterized the issues as follows:

The issues in this case concern the constitutional validity of Maryland Criminal Statutes, commonly known as Sunday closing laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting the establishment of religion or prohibiting the free exercise thereof.¹⁰⁷

The facts were simple:

The appellants are seven employees of a large discount department store located on a highway in Anne Arundel County, Maryland. They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples and a toy submarine in violation of Md. Ann. Code, Art. 27, para. 521. Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts from the general prohibition the retail sale in Anne Arundel County all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs. It now further provides that any retail establishment in Anne Arundel County which does not employ more than one person other than the owner may operate on Sunday.¹⁰⁸

The Court seemed quite determined to deal with the question of Blue Laws once and for all and as a result dealt with the statutory provisions in great detail. Chief Justice Warren sets out Maryland's other Sunday observance provisions:

Section 492 of Md. Ann. Code, Art. 27, forbids all persons from doing any work or bodily labor on Sunday and forbids permitting children or servants to work on that day or to engage in fishing,

¹⁰³ (1961), 366 U.S. 420.

¹⁰⁴ (1961), 366 U.S. 617.

¹⁰⁵ (1961), 366 U.S. 582.

¹⁰⁶ (1961), 366 U.S. 599.

¹⁰⁷ (1961), 366 U.S. 423.

¹⁰⁸ *Ibid.*, 422-423.

hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. Section 522 of Md. Ann. Code, Art. 27, disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, Md. Ann. Code, Art. 27 §509, exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. Section 90 of Md. Ann. Code, Art. 2B makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day by vendors holding different types of licenses, in different political divisions of the State—particularly in Anne Arundel County.

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. The taking of oysters and the hunting or killing of game is generally forbidden, but shooting conducted by organized rod and gun clubs is permitted in one county. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday.¹⁰⁹

The appellants had argued that the Maryland statutes had violated the "equal protection" clause of the Fourteenth Amendment in several ways. They alleged that the classifications contained in the statutes setting out the commodities which could and could not be sold on Sunday were without rational and substantial relation to the object of the legislation, that the exceptions rendered the statutes arbitrary, and that the exemptions for the operation of various amusements rendered the statute capricious.

To the appellants' contention that the statute denied "equal protection" because it extended exemptions to certain Anne Arundel County

¹⁰⁹ *Ibid.*, 423-424.

retailers not enjoyed by other Maryland retailers the Chief Justice replied: "We have held that the equal protection clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite."¹¹⁰

As far as the question of vagueness was concerned, Chief Justice Warren did not think that there would be any actual difficulty in ascertaining the meaning of "merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks, etc." But he was disinclined to decide the question of vagueness since it had not been decided in the Courts below.¹¹¹

The most powerful of the appellants' arguments was the allegation that the Sunday observance laws tended to "establish" the Christian religion contrary to the First Amendment of the Constitution. The Chief Justice characterized the argument as follows:

The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day. In substantiating their "establishment" argument, appellants rely on the wording of the present Maryland statutes, on earlier versions of the current Sunday laws and on prior judicial characterizations of these laws by the Maryland Court of Appeals.¹¹²

The Chief Justice then launched into an extensive discussion of the history of Sunday observance laws. He observed that the basis of much of the United States Sunday observance law is the English *Sunday Observance Act, 1677* and concluded that there could be little doubt that that statute was designed to aid the established Church. But he did not find this conclusive. Sunday observance legislation had, over the years, come more and more to serve secular purposes. He quoted Justice Field, a fellow Californian, in the case of *Ex parte Newman*:

Its requirement is a cessation from labor. In its enactment, the Legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general

¹¹⁰*Ibid.*, 425-426.

¹¹¹*Ibid.*, 427.

¹¹²*Ibid.*, 431.

welfare is advanced, labor protected, and the moral and physical well-being of society promoted.¹¹³

The Chief Justice alluded to James Madison, a noted disestablishmentarian who appeared to have seen no inconsistency in his advocating the passage of a bill forbidding Sunday labour. What the Chief Justice was indicating was that there is something inherently wrong in permitting continuous labour without a pause. The fact that an organized religion's code of ethics condemns what a statute also condemns does not by itself invalidate that statute. Chief Justice Warren cited the case of *Reynolds v. United States* where the Supreme Court of the United States upheld a federal law forbidding polygamy, which law was under attack by the Mormons. This all brought the Chief Justice to the point where he was able to say:

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.¹¹⁴

The Chief Justice then returned to the specific Maryland legislation in question. He concluded that the existing Maryland laws "are not simply verbatim reenactments of their religiously oriented antecedents." He concluded that the legislation is really aimed at insuring a weekly pause in what would otherwise be unceasing labour. This of course opens the way for an argument that so long as the state can achieve its secular purpose without aiding any given religion or infringing on any religious liberties, it ought to pursue the course of non-interference. The Chief Justice's answer to this was that the legislation is not merely "a one day's rest in seven statute" whose end could be just as easily achieved by permitting each individual to decide when he will pause:

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.¹¹⁵

In advancing this view the Chief Justice relied at length upon the debates in the British Parliament at the time of the introduction of what later became the *Shops (Sunday Trading Restrictions) Act, 1936*. Chief Justice Warren further bolstered his opinion by pointing to the

¹¹³ *Ibid.*, 436–437.

¹¹⁴ *Ibid.*, 444.

¹¹⁵ *Ibid.*, 450.

practical difficulty of enforcing a pause law when each person has the option to observe the day of rest when he sees fit.

Dealing with all of the cases cited above, Justice Frankfurter pleaded eloquently for what he considered to be a great cultural heritage:

More important, one-day-a-week laws do not accomplish all that is accomplished by Sunday laws. They provide only a periodic physical rest, not that atmosphere of entire community repose which Sunday has traditionally brought and which, a legislature might reasonably believe, is necessary to the welfare of those who for many generations have been accustomed to its recuperative effects.

The same considerations might also be deemed to justify the choice of Sunday as the single common day when labor ceases. For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven that no other day could provide. The will of a majority of the community, reflected in the legislative process during scores of years, presumably prefers to take its leisure on Sunday. The spirit of any people expresses in goodly measure the heritage which links it to its past. Disruption of this heritage by a regulation which, like the unnatural labors of Claudius' shipwrights, does not divide Sunday from the week, might prove a measure ill-designed to secure the desirable community repose for which Sunday legislation is designed.

Justice Frankfurter gave a lengthy judgment which included some five or six yards of charts, setting out the nature of American Sunday observance laws.

Legislation currently in force in forty-nine of the fifty States illegalizes on Sunday some form of conduct lawful if performed on weekdays. In several States only one or a few activities are banned—the sale of alcoholic beverages, hunting, barbering, pawn-broking, trading in automobiles—but thirty-four jurisdictions broadly ban Sunday labor, or the employment of labor, or selling or keeping open for sale, or some two or more of these comprehensive categories of affairs. In many of these States, and in others having no state-wide prohibition of industrial or commercial activity, municipal Sunday ordinances are ubiquitous. Most of these regulations are the product of many re-enactments and amendments. Although some are still built upon the armatures of earlier statutes, they are all, like the laws of Maryland, Massachusetts and Pennsylvania which are before us in these cases, recently reconsidered legislation. As expressions of State policy, they must be deemed as contemporary as their latest enacted exceptions in favor of moving pictures or severer bans of Sunday motor vehicle trading. In all, they reflect a widely felt present-day need, for whose satisfaction old laws are shaped and new laws enacted.

To be sure, the Massachusetts statute now before the Court, and statutes in Pennsylvania and Maryland, still call Sunday the "Lord's day" or the "Sabbath". So do the Sunday laws in many other States. But the continuation of seventeenth century language does not of itself prove the continuation of the purposes for which their successors of the twentieth have retained them and modified them.¹¹⁶

Justice Douglas was unimpressed by the argument that Sunday legislation had gradually become civil in nature ("Sunday Laws has always been a mixed bag").¹¹⁷ The majority had relied to some extent on *Reynolds v. United States* where the Mormons challenged a law forbidding polygamy and upon *Prince v. Commonwealth of Massachusetts* where the Jehovah's Witnesses had challenged a law forbidding children under the age of twelve to sell papers or merchandise on the street. The state's authority over children has always been broader than that over adults. None of the actions involved in the present cases involved children, and none of them involved any act which the society deemed to be immoral. It was the fact that the acts were done on a day of special religious significance to the majority that made them obnoxious.

The Court balances the need of the people for rest, recreation, late sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. I see no place for it in the constitutional scheme. A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause. Any other reading imports, I fear, an element common in other societies but foreign to us. Thus Nigeria in Article 23 of her Constitution, after guaranteeing religious freedom, adds, "Nothing in this section shall invalidate any law that is reasonably justified in a democratic society in the interest of defense, public safety, public order, public morality, or public health." And see Article 25 of the Indian Constitution. That may be a desirable provision. But when the Court adds it to our First Amendment, as it does today, we make a sharp break with the American ideal of religious liberty as enshrined in the First Amendment.¹¹⁸

The general picture in the United States is confused in this respect. Prior to *McGowan v. Maryland*, a number of state Courts had invalidated their state Sunday observance laws. The Supreme Court decision shed doubt on the correctness of many of these state Court decisions. Of course the decision of the Supreme Court is not in itself conclusive. It did not hold all Sunday observance legislation, no matter how worded, to be valid. Besides this, each state has its own

¹¹⁶ *Ibid.*, 495-498.

¹¹⁷ (1961), 366 U.S. 568.

¹¹⁸ (1961), 366 U.S. 575-576.

constitution and the constitution of any given state may set a standard different from the federal constitution. The enforcement of the various Blue Laws and the laws themselves are still open for attack on the grounds of discrimination. The laws are unpopular but often raise great partisan passion.

The uncertainty was intensified by the decision in 1963 of the United States Supreme Court in *Sherbert v. Verner*.¹¹⁹ In this case the appellant had become a Seventh-day Adventist in 1957. In 1959 the work week in the textile mill where she was employed was increased from five to six days, including Saturday. Because of her refusal to work on Saturday the appellant was discharged. Her refusal to work on Saturday made it impossible for her to find employment in any of the textile mills in that part of South Carolina where she lived. The majority of the Supreme Court, per Justice Brennan, felt that the denial of unemployment benefit on the grounds that she would not accept suitable work was a violation of the appellant's right to the free exercise of her religion.

Sunday observance, apart from any constitutional consideration, lies within the jurisdiction of each state. Generally speaking the states located on the Eastern Seaboard have Sunday observance laws and those located on the Pacific do not. It is difficult to give an accurate statement of the current position of many states since statutes often remain on the books even though they have long since been invalidated by the Courts. The following East Coast states have laws forbidding Sunday retailing: Maine; Maryland; Massachusetts; New Jersey; New York; North Carolina; Puerto Rico (territory); Rhode Island; South Carolina; Delaware (no state law which restricts retail selling but cities and towns are authorized to prohibit worldly activity on Sunday); and Florida (State Supreme Court held the state law to be invalid because of arbitrary exceptions in 1955). There are no laws restricting Sunday selling in the following West Coast states: Alaska; California; Hawaii; Oregon; and Washington.¹²⁰

Sabbatarian exemption had been an issue in the litigation before the United States Supreme Court. Out of thirty-six states forbidding Sunday retail selling, twenty-one extend some form of sabbatarian exemption. Those states granting a sabbatarian exemption are as follows: Arkansas, Connecticut; Illinois; Indiana; Iowa; Kentucky; Maryland; Massachusetts; Michigan; Nebraska; New York; North Dakota; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Dakota; Vermont; Virginia; West Virginia; and Texas, which forbids retail selling on either Saturday or Sunday at the retailer's option.

Herewith follows an examination of the legislation on Sunday observance in four U.S. states. It is fairly representative of the legislation in this area.

¹¹⁹(1963), 374 U.S. 398.

¹²⁰'Liberty: a magazine of religious freedom', Vol. 64 No. 2, March-April 1969.

(a) California

The *California Civil Code* provides that Sunday shall be a holiday as the term is used throughout that Code.¹²¹ This is of no practical effect except in matters of legal procedure. The *Penal Code* provides that anyone conducting, participating in or viewing a boxing match on Sunday shall be guilty of a misdemeanour.¹²² Aside from these two provisions, California has no laws relating to Sunday.

(b) Louisiana

Louisiana law generally requires that all stores, shops, saloons and places of public business remain closed from midnight Saturday to midnight Sunday. The penalty for violation is a fine from \$25 to \$250 or imprisonment from 10 to 30 days, or both.¹²³ There are exemptions for a number of shops, including book stores and drugstores, as well as for public parks, places of recreation, dairies, undertakers, newsdealers, railways, hotels and restaurants. The two latter may sell wine with meals, but otherwise alcoholic beverages may not be sold or delivered on Sundays.¹²⁴ There is also an exemption in favour of bakeries, but this may be altered by various municipalities. Those having a population over 25,000 may regulate the Sunday opening of butcher shops and bakeries, and those with a population of over 100,000 may also regulate the sale and delivery of bakery products on Sunday.¹²⁵

There is also a number of specific prohibitions. It is against the law to open libraries on Sunday,¹²⁶ to hold a race at a race track,¹²⁷ or to carry on business as a barber.¹²⁸ In 1962 a new section was added which prohibits the sale of certain specified consumer goods.¹²⁹ The purpose was avowed to be "to promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments". The penalties were somewhat harsher than the general penalties: a maximum fine of \$100 for the first offence, and imprisonment for not more than six months or a maximum fine of \$500 or both upon subsequent convictions. In addition, any person might apply for an injunction stopping such transactions. The sale was prohibited of certain goods, including clothing, building materials, furniture, appliances, and new and used cars, although in an emergency automobile supplies could be sold and servicing done. The validity of this action has several times been challenged and uniformly upheld.¹³⁰

¹²¹ *California Civil Code*, s. 7.

¹²² *California Penal Code*, s. 413 1/2.

¹²³ Lsa. R.S. 51:191.

¹²⁴ Lsa. R.S. 51:192.

¹²⁵ Lsa. R.S. 33:4783.

¹²⁶ Lsa. R.S. 25:68.

¹²⁷ Lsa. R.S. 4:151.

¹²⁸ Lsa. R.S. 51:193.

¹²⁹ Lsa. R.S. 51:194.

¹³⁰ See *State v. Weiner* (1964), 161 So.2d 755; *State v. Deutch* (1964), 161 So.2d 730; and *Baker's Carrollton Shoe Store Inc. v. Circle Shoes Inc.* (1964), 161 So.2d 600.

(c) Michigan

The law of Michigan specifically prohibits barbers¹³¹ and pawnbrokers¹³² from carrying on business on Sunday. It also forbids the sale of new or used motor vehicles¹³³ except in cases where the proprietor remains closed on some other day which he regards as the sabbath.¹³⁴ The general law regarding Sunday observance was completely reenacted in 1962¹³⁵ to provide for closing on either Saturday or Sunday. A large part of this measure was held to be invalid,¹³⁶ however, and in 1968, it was repealed.¹³⁷ Thus Michigan is left with no Sunday observance law aside from a few specific prohibitions. There also remains a provision which allows incorporated cities to regulate Sunday closing. This section does not seem to have been considered in the light of either the 1962 law or its subsequent repeal, but was upheld in 1962.¹³⁸ In addition, the liquor laws which heretofore had prohibited the sale of liquor on Sundays were amended in 1968 to introduce a local option whereby liquor could be sold with meals after 2 p.m.¹³⁹ This option could come into effect, at first by the authorization of the county legislative body within 60 days of the passage of the Act, and subsequently as a result of a vote initiated by a petition signed by 8% of the local voters.

Finally, Michigan law provides that any conveyance of real property on Sunday or any other contract made on Sunday, except one authorized by the 1962 legislation shall be void.¹⁴⁰ This section has not been analyzed since the 1968 repeal, but does not seem to have prevented stores from selling on that day.

(d) New York

In New York Sunday activities are regulated mainly in the *General Business Law*, although other references to the day may be found in various statutes. For example, the sale of alcoholic beverages for off-premises consumption is prohibited on Sunday by the *Alcoholic Beverage Control Law*.¹⁴¹ The same law permits the sale of liquor for consumption on the premises except between the hours of 3 a.m. and 1 p.m. on that day.¹⁴²

The *General Business Law* declares that Sunday is a day set aside for both rest and religious observance and generally prohibits any act that will interfere with these aims,¹⁴³ on pain of a fine or imprisonment.¹⁴⁴ For the first offence the fine is \$5-\$10 or 5 days in jail rising to a fine of

¹³¹ M.C.L.A. 338:681.

¹³² M.C.L.A. 446:217.

¹³³ M.C.L.A. 435:251.

¹³⁴ M.C.L.A. 435:252.

¹³⁵ P.A. 1962, No. 128.

¹³⁶ *Arlan's Department Stores Inc. v. Kelly* (1964), 130 N.W. 2d 892.

¹³⁷ P.A. 1968, No. 58.

¹³⁸ *Westwick v. City of Detroit* (1962), 113 N.W. 2d 876.

¹³⁹ M.C.L.A. 436:19e; amended by P.A. 1968, No. 313.

¹⁴⁰ M.C.L.A. 435:11.

¹⁴¹ McKinney's Consolidated Laws of New York, *Alcoholic Beverage Control Law*, s. 105(14).

¹⁴² *Ibid.*, s. 106(5).

¹⁴³ McKinney's Consolidated Laws of New York, *General Business Law*, s. 2.

¹⁴⁴ *Ibid.*, s. 4.

\$10–\$20 and the possibility of imprisonment for 5–20 days for subsequent offences. In addition to the general prohibition, there are specific prohibitions against carrying on trade as a barber on Sunday;¹⁴⁵ against all labour on Sunday, except for works of charity and those necessary for the order, health or comfort of the community;¹⁴⁶ against all trade, manufacturing and agricultural or mechanical employment except for works of necessity which are carried out so as not to disturb the repose of the community;¹⁴⁷ and against all public selling or offering for sale.¹⁴⁸ There are, of course, exceptions to this last prohibition. These include meals consumed on the premises or served by caterers, and the sale of tobacco, bread, milk, eggs, fruit, flowers, confectionery, souvenirs, newspapers, gasoline, cemetery monuments, and medical supplies. In addition, food, except uncooked meals, may be sold by anyone before 10 a.m., and by delicatessen dealers, bakeries, farmers' markets and roadside stands at any time in areas with over 40,000 population. Finally, the retail sale of beer is permitted except between the hours of 3 a.m. and 1 p.m. Where goods other than those exempted are offered for sale, they are liable to forfeiture.

The *General Business Law* recognizes that certain groups keep other days as the sabbath and in the proper circumstances such observance can be a defence to a prosecution for a Sunday violation.¹⁴⁹ In such cases it is necessary not only to show that the violator uniformly observes another day as the sabbath, but also that he carries out his occupation without disturbing others' observance on Sunday. Where the prosecution is for carrying on a business, the proprietor must also show that the business is closed on his holy day and that only he and his immediate family work on Sunday.

This statute also covers sports and entertainment on Sundays. Generally, all public sports except professional golf tournaments are prohibited on Sundays, but municipal authorities may permit events for which an admission fee is charged at any time after 1.05 p.m.¹⁵⁰ A similar provision is made in respect of public entertainments which include legitimate theatrical performances, concerts, recitals and motion pictures. Performances may take place by the permission of a local ordinance. This law became effective on September 1, 1967.¹⁵¹

¹⁴⁵ *Ibid.*, s. 16.

¹⁴⁶ *Ibid.*, s. 5.

¹⁴⁷ *Ibid.*, s. 8.

¹⁴⁸ *Ibid.*, s. 9.

¹⁴⁹ *Ibid.*, ss. 6, 10.

¹⁵⁰ *Ibid.*, s. 7; amended by L. 1968, c. 9.

¹⁵¹ *Ibid.*, s. 15.

APPENDIX IV

LETTER FROM COUNSEL INVITING WRITTEN BRIEFS



ONTARIO LAW REFORM COMMISSION SUNDAY OBSERVANCE LEGISLATION PROJECT

COMMISSIONERS
H. ALLAN LEAL, Q.C., LL.M., LL.D.
CHAIRMAN

HONOURABLE JAMES C. MCURER, S.M., LL.D.
HONOURABLE RICHARD A. BELL, P.C., Q.C.
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PROJECT SECRETARY
MRS. P. A. BLACK

SIXTEENTH FLOOR
18 KING STREET EAST
TORONTO 1
TELEPHONE: 365 4761

APPENDIX IV

LETTER FROM COUNSEL INVITING WRITTEN BRIEFS

The Ontario Law Reform Commission has been requested by the Minister of Justice and Attorney General for Ontario to undertake a study of Sunday Observance Legislation in effect in Ontario in all its aspects. The study is to deal not only with the history and background of the legislation including matters of legislative jurisdiction and competence but also the relevance of these laws within Ontario having regard to the changing nature of society.

The Commission wishes to hear the views and experience of all segments of society in Ontario, and accordingly, would entertain written and oral submissions from you on any aspect of the study. I am enclosing a copy of a memorandum which might assist you in the preparation of a brief to the Commission.

In order that the Commission may have an opportunity to study your written submission before the public hearings begin, it should be in my hands not later than February 1, 1970. May I emphasize that the list of topics given in the memorandum is suggested only, and is not intended in any way to limit the scope of your presentation.

We shall look forward to hearing from you.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'R. Atkey'.

Ronald G. Atkey
Counsel

RGA/pab
enc.

APPENDIX V

MEMORANDUM TO ASSIST THOSE PREPARING BRIEFS FOR SUBMISSION TO THE ONTARIO LAW REFORM COMMISSION ON THE SUBJECT OF SUNDAY OBSERVANCE LEGISLATION

S U M M A R Y

A. GENERAL GUIDANCE

1. Format of Submissions
2. Deadline for Submissions
3. Public Hearings

B. CONTENT OF SUBMISSIONS

1. Concerns of the Commission
2. Suggested Topics

A. GENERAL GUIDANCE

1. *Format of Submissions*

If convenient, briefs should be double-spaced with consecutive paragraphs numbered, on white paper, letter-size (8½ × 11 ins.). The name, telephone number and address of the person or organization submitting the brief should be clearly indicated. If you wish to attend a public hearing for the purpose of presenting your brief, please so state and indicate the name of any one of the cities in which the public hearings are slated to take place. Please state also who will be appearing (names, addresses and positions).

2. *Deadline for Submissions*

Briefs should reach the undersigned on or before February 1st, 1970. If possible and convenient, the Commission would appreciate receiving ten copies of each brief.

3. *Public Hearings*

Depending upon the localities from which briefs are received and requests made for public hearings, it is tentatively planned to hold public hearings in Hamilton, Kenora, Kingston, London, Ottawa, St. Catharines, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins, Toronto, and Windsor, and at which it is hoped that at least three members of the Commission will be sitting. The dates, times and places of these hearings will be published in the appropriate local newspapers, and those who have expressed a desire to appear will receive notice in due course. The Commission will make every effort to grant an oral hearing to every person or organization submitting a written brief, but it may not always be possible to do so.

In view of the fact that the full text of written briefs will be available to all members of the Commission, those appearing should feel free merely to summarize orally the major points in their submissions, including conclusions and recommendations. Persons appearing may be questioned by the members of the Commission or the Commission's counsel, and such questions will not necessarily be restricted to the material and subject matter contained in the written submissions.

B. CONTENT OF SUBMISSIONS

1. *Concerns of the Commission*

The Commission is primarily concerned with the following subjects:

- (a) The constitutional jurisdiction of the province of Ontario in the field of Sunday observance legislation, and in particular, the provincial role in the enforcement process.
- (b) The effect of Sunday observance legislation on the religious life of the community.
- (c) Present sociological attitudes and group patterns of behaviour concerning Sunday observance, including matters such as convenience, recreation and the use of leisure time.
- (d) The economic implications of extended operation of major businesses beyond present practices into a seven-day week.
- (e) The physiological and psychological effect of a uniform "pause day" in maintaining the well-being of the individual.

2. *Suggested Topics*

NOTE: The following topics are provided as examples only, and are not to be taken as limiting the scope of individual submissions. The Commission is anxious to secure the widest possible range of views on all aspects of Sunday observance legislation. The questions which follow, therefore, are intended merely as suggestions for individual submissions and to indicate generally some of the lines which the Commission may wish to pursue. It is not expected that a brief will necessarily deal with all suggested topics.

Legal

- (a) What is the proper constitutional jurisdiction of the province of Ontario in the field of Sunday observance legislation, and how far can the province go in regulating activity within the province in pursuit of observing Sunday as a day of rest?
- (b) Should the Attorney General for Ontario have a discretion as to whether prosecutions should be instituted under the federal Lord's Day Act and if so, according to what criteria should he exercise that discretion?
- (c) Should each local municipality be allowed to determine the extent of Sunday observance by bylaw, or should conditions be uniform across the province?
- (d) Should contracts made on Sunday generally be unenforceable?

Religious

- (e) To what extent is Sunday observance, as practised today, still based on religious attitudes as opposed to other factors in Ontario?
- (f) Has the government an obligation to support Sunday observance based on religious grounds? If so, how best can this purpose be accomplished?
- (g) Quite apart from judicial decision, could Sunday observance legislation in Ontario be regarded as an infringement of a citizen's fundamental right to freedom of religion and conscience?

Sociological

- (h) Is a government-supported "pause day" desirable in Ontario, and should that day of the week be uniform throughout the province (except for works of necessity and mercy)?
- (i) Have the great majority of Ontario residents become so conditioned to Sunday as the one day of rest in seven that they would continue this practice without government support?
- (j) Do Ontario residents want Sunday to be open as a general shopping day for groceries, clothing and other normal retail items? If so, for what items?
If there are large numbers of Ontario residents who don't want such convenience, would they tolerate the increased traffic, noise and general activity generated by those who do?
- (k) Are Ontario residents willing to undergo the environmental changes that would occur as a result of Sunday openings of commercial retail establishments?
- (l) To what extent is Sunday observance peculiar to the family, as opposed to the individual, and to what extent would the removal of government support for Sunday observance do damage to the maintenance of the family unit?

Economic

- (m) What industries and services must function seven days a week, either because of continuous operational factors (e.g., petroleum refineries) or because of the necessity of uninterrupted service to the public (e.g., telephone companies)? For example, should gasoline service stations and drugstores be included? What others?
- (n) In terms of Sunday openings, should there be any distinction between cultural events, sporting events and commercial retail enterprises?
- (o) Would Sunday openings for commercial retail establishments significantly increase the price of goods and services through higher wages and maintenance costs or would Sunday openings generate more volume so as to offset those items?
- (p) What effect would general Sunday opening have on the collective bargaining process?

- (q) How would Sunday openings affect the per hour wage rates in various industries such as retail merchandising, and how would it affect the amount of overtime work by employees and the rate of pay for such overtime?
- (r) Is government legislation necessary at all to control Sunday openings of commercial retail establishments, or can the market provide sufficient control?

Physiological and Psychological

- (s) Is a "pause day" once a week necessary for the maintenance of physical and mental well-being of the individual?
If so, is it necessary that the pause day be uniform throughout the province or can it be staggered for various individuals?
- (t) Would the absence of a government-supported pause day result in any serious deterioration in the mental health of large numbers of Ontario residents? What are the advantages and disadvantages of the present "weekend syndrome" which seems to exist for a great portion of Ontario's working population?
- (u) Would Sunday openings, and the resulting staggering of the work week and days of rest for many people in jobs significantly relieve the strain on our parks and other recreational facilities?

The Commission would welcome the results of any relevant research in this area, including empirical data from any public opinion surveys. Such material may be incorporated in the written submissions or forwarded separately. Those wishing to communicate with the Commission on the subject of the inquiry may do so through:

Ronald G. Atkey,
Counsel,
Sunday Observance Legislation Project,
Ontario Law Reform Commission,
Sixteenth Floor,
18 King Street East,
Toronto 1.

Telephone: 365-4761

APPENDIX VI

LIST OF PERSONS APPEARING AT THE ORGANIZATIONAL MEETING OF DECEMBER 9, 1969

1. Myer Sharzer, Executive Director,
Canadian Jewish Congress — Central Region.
2. Hugh Buchanan, Ontario Director,
*Retail, Wholesale and Department Store Union (affiliated with
the Ontario Federation of Labour).*
3. Peter J. Bruton,
The Becker Milk Company Limited.
4. W. H. Metherell,
Canadian Paint and Wallpaper Dealers Association.
5. Howard Tate, General Manager,
The Canadian National Exhibition Association.
6. J. L. Adams,
Yonge-Bloor-Bay Business Men's Association.
7. D. L. Michael, Counsel,
Ontario-Quebec Conference of the Seventh-day Adventist Church.
8. B. S. Onyschuk, Counsel,
Oshawa Wholesale Limited.
9. John C. Pallett, Q.C., Counsel,
Dixie Fruit Market Limited and other independent retailers.
10. Dennis Roberts.
11. R. L. Westell, Barrister.
12. Rev. Alvin McGrath, General Secretary,
Lord's Day Alliance of Canada.
13. J. W. Younger, Q.C., Counsel,
Evangelical Fellowship of Canada.
14. J. O. Goodman,
The Automotive Transport Association of Ontario.
14. C. P. Robins, President,
The Toronto Branch of the Consumers' Association of Canada.

APPENDIX VII

LIST OF BRIEFS RECEIVED

1. Christian Trade Unions of Canada.
2. Newmarket Women's Christian Union.
3. Mr. Peter C. Swann, Director, Royal Ontario Museum.
4. The Dominion Drama Festival.
5. Kingsway Baptist Church, Toronto.
6. Professor James A. Rendall, University of Western Ontario.
7. W. B. Hamilton Shoes Limited, Toronto.
8. Geo. Snyder Shoes, Simcoe.
9. Mr. O. R. G. Holmes, Clarkson.
10. Bishop J. A. Watton, Bishop of the Anglican Diocese of Moosonee.
11. Elm Street United Church Men's Club, St. Catharines.
12. The Oshawa and District Labor Council.
13. The Religious Society of Friends (Quakers) — Hamilton Monthly Meeting.
14. Mr. Geoffrey A. Suckling, Tillsonburg.
15. Presbytery of Hamilton, Presbyterian Church in Canada.
16. The Lord's Day Alliance of Canada.
17. Committee on Evangelism and Social Service, Renfrew Presbytery of the United Church of Canada.
18. Mrs. Dora L. Strachan, Richmond Hill.
19. Mr. Edgar V. Hewitt, London.
20. Rev. H. Russell Ferguson, Presbytery of Glengarry, Kenyon Presbyterian Church, Dunvegan.
21. The Mennonite Conference of Ontario.
22. Rev. P. K. Smith, Free Methodist Church, Niagara Falls.
23. Mr. J. A. Thomas, London.

24. Council of Baptist Churches, Guelph Association.
25. Mr. Harold A. Wills, Cochrane Public Library.
26. The Clergy of the Town of Caledonia.
27. Provincial Building and Construction Trades Council of Ontario.
28. Mrs. Susan R. Hewitt, London.
29. Mr. J. Harland Hewitt, London.
30. The Albert Britnell Book Shop Limited, Toronto.
31. The Becker Milk Company Limited.
32. Mr. T. Vincent Taylor, London.
33. Misses Rebecca and Winnie Bryan, London.
34. Mr. Bruce R. Bryan, London.
35. Mr. Harry Baird, Hamilton.
36. The Sarnia and District Chamber of Commerce.
37. Toronto District Women's Christian Temperance Union.
38. Western Fair Association.
39. Mrs. Verna Wice, the Ontario Women's Christian Temperance Union.
40. Christian Labour Association of Canada.
41. Gordon Mackay & Stores Limited, Toronto.
42. The Canadian National Exhibition Association.
43. Greater Toronto Business and Professional Federation.
44. The Consumers' Association of Canada, Toronto Branch.
45. Mr. David R. Freeman, Kingston.
46. Mr. Gordon A. Rainbow, Toronto.
47. Legislative Committee, The Toronto Automobile Dealers Association.
48. Mr. John Allan Taylor, London.
49. The Yonge-Bloor-Bay Association Inc.

50. F. W. Woolworth Co. Limited.
51. The Canadian Shoe Retailers' Association Incorporated.
52. Oxford Book Shops Limited, London.
53. Ontario Members of the Associated Stores of Canada.
54. The Session of Knox Presbyterian Church, Milton.
55. Kitchener-Waterloo & District Labour Council.
56. Kitchener Meeting of the Religious Society of Friends (Quakers).
57. The Sarnia and District Labour Council.
58. Kenora-Keewatin and District Labour Council.
59. Ontario Motor Coach Association.
60. The E. B. Eddy Company Limited.
61. Mrs. Annie Holinshead, Toronto.
62. Yonge Street and Newmarket Friends Meeting (Quakers).
63. Rev. John F. G. Morris, St. Andrew's United Church, Oshawa.
64. Mac's Milk Limited.
65. Ontario Federation of Labour.
66. The Committee on Evangelism, The Presbyterian Church in Canada.
67. Mr. Gerald C. Grimaud, student, York University.
68. R. A. Beamish Stores Company Limited, Ottawa.
69. Domtar Limited.
70. Mr. S. Lyle McLaren, Cornwall.
71. Oshawa Wholesale Limited.
72. Mr. Charles D. Kent, Director, London Public Library and Art Museum.
73. Public Affairs Committee, Council of the Baptist Convention of Ontario and Quebec.
74. The Jockey Club Limited.
75. Dr. Glenn Sawyer, Ontario Medical Association.

76. Mr. Robert C. Norris, Toronto.
77. Royal Agricultural Winter Fair.
78. The Ottawa Real Estate Board.
79. Walker's Store, Gordon Mackay & Stores Limited, Thunder Bay.
80. Meat Packers Council of Canada.
81. Bev. and Don F. Robinson, A. Rathwell and Bernice Rathwell, Sault Ste. Marie.
82. Algoma Presbytery, The United Church of Canada.
83. Mr. Morris Manchester, Sault. Ste. Marie.
84. Middlesex Presbytery, London Conference, The United Church of Canada.
85. The Catholic Women's League of Canada.
86. Toronto Monthly Meeting of the Religious Society of Friends (Quakers).
87. Canadian Retail Hardware Association.
88. Radicals for Capitalism.
89. The Sault and District Ministerial Association.
90. Ontario Women's Christian Temperance Union.
91. United Church Women, St. George's Church, Toronto.
92. Abitibi Paper Company Limited.
93. The Ottawa Evangelical Ministerium.
94. Dr. Russ Spangler, Minister, Ottawa Seventh-day Adventist Church.
95. Kimberly-Clark of Canada Limited.
96. Mrs. Dorothy E. McGuire, The Christian Women's Council on Education.
97. St. Catharines Clergy Fellowship.
98. The Ontario Paper Company Limited.
99. The Garage Operators' Association of Ontario.
100. Niagara District Evangelical Ministers' Fellowship.

101. Greater Grimsby Businessmen's Association.
102. Session of St. Andrew's United Church, Sault Ste. Marie.
103. Laura Secord Candy Shops Limited.
104. Evangelical Fellowship of Canada.
105. Dixie Fruit Market Limited.
106. Sault Ste. Marie Chamber of Commerce.
107. Mr. Alan Wheable, student, University of Western Ontario.
108. Rev. Douglas E. W. Lennox, Appin, Guthrie-Melbourne, and Burns' Presbyterian Church, Mosa Township.
109. Mr. and Mrs. Emerson McVicar, Newbury.
110. Mr. Arthur Birnbaum, student, University of Western Ontario.
111. The Ontario Parks Association.
112. Downtown Windsor Business Association.
113. Loblaw Groceries Company Limited.
114. Dominion Stores Limited.
115. Ontario-Quebec Conference, Seventh-day Adventist Church.
116. Mr. George Downham, H. C. Downham Company Limited, Strathroy.
117. The Provincial Council of Women of Ontario.
118. Newmarket Ministerial Association.
119. Greater Niagara Chamber of Commerce.
120. Mr. R. A. Smith, Algonquin Regional Library.
121. The Parish Council, St. Gregory's Church, Sault Ste. Marie.
122. Dryden Paper Company Limited.
123. MacLachlan Lumber Company (Kingston) Limited.
124. Rev. Duncan MacGregor, First Baptist Church, Sault Ste. Marie.
125. Canadian Jewish Congress (Central Region).
126. Anglican and Roman Catholic Dioceses of Toronto.

127. The Hamilton Presbyterial United Church Women.
128. The Hamilton Downtown Association.
129. Lt. Col. W. Ratcliffe, Divisional Commander, The Salvation Army, Southern Ontario Division.
130. Rev. H. F. MacEwen, Bible Presbyterian Church, Toronto.
131. Bethel Baptist Church, Toronto.
132. Ontario Council of the National House Builders Association.
133. Associated Gospel Churches of Canada.
134. Seventh-day Adventist Reformed Church, Eastern Canadian Conference.
135. The Great Atlantic and Pacific Tea Company Limited.
136. The Pentecostal Assemblies of Canada.
137. The Ontario-Minnesota Pulp and Paper Company Limited.
138. Col. William F. Ross, The Salvation Army, Headquarters for Canada and Bermuda.
139. The Great Lakes Paper Company Limited.
140. The Windsor Chamber of Commerce.
141. Mr. Paul Lee, student, University of Toronto.
142. Mr. W. Gerald Donnell, Free Methodist Church, East Ontario Conference.
143. Mr. C. H. Parker, The Kingston Presbytery of the United Church of Canada.
144. Rev. William Loopstra, Canadian Reformed Church of Hamilton.
145. Women's Inter-Church Council, Hamilton.
146. Mr. Reuel S. Amdur, Guelph.
147. Rev. Harry Mennega, Consistories of the Immanuel and Mount Hamilton Christian Reformed Churches.
148. Men's Fellowship, Bethel Gospel Tabernacle, Hamilton.
149. Urban Development Institute.
150. Windsor Public Library.

151. Synod of Huron, Anglican Church of Canada.
152. Brampton-Chinguacousy Chamber of Commerce.
153. Welland Pharmacists' Association.
154. Ontario Retail Gasoline and Automotive Service Association.

APPENDIX VIII

LIST OF PERSONS APPEARING AT THE PUBLIC HEARINGS

TORONTO

February 23, 1970.

1. Oakah L. Jones, President,
2. Howard Tate, General Manager,
The Canadian National Exhibition Association.
3. Hugh Buchanan, Ontario Diector,
Retail, Wholesale and Department Store Union.
4. David Archer, President,
5. John Eleen, Research Director,
The Ontario Federation of Labour.
6. Gerald Grimaud.
7. Craig Waldron, Secretary-Treasurer,
Mac's Milk Limited.
8. Robert Lowe, President,
The Becker Milk Company Limited.
9. Rev. Edgar Baily,
Kingsway Baptist Church.
10. Roy Britnell,
The Albert Britnell Book Shop Limited.

February 24, 1970.

11. W. B. Hambly, President,
Greater Toronto Business and Professional Federation.
12. T. Edwards,
Oshawa & District Labor Council.
13. J. G. Coburn, President,
14. Rev. A. S. McGrath, General Secretary,
The Lord's Day Alliance of Canada.
15. Dr. Dora Strachan.

16. Rev. Wayne A. Smith, Assistant Secretary,
17. Rev. Alex McCombie,
*Committee on Evangelism, Board of Evangelism and Social
Action, Presbyterian Church in Canada.*
18. Mrs. Shirley Sanderson.

February 25, 1970.

19. Gordon Rainbow.
20. H. G. Pittman.
21. J. F. Heggie.
22. F. K. Corney.
23. W. P. Watson, General Manager,
Royal Agricultural Winter Fair.
24. J. J. Mooney, Executive Vice-President.
25. J. H. Kenney, Assistant General Manager,
The Jockey Club Limited.
26. C. P. Robins, President,
27. Mrs. C. G. Barrick, Past President,
Toronto Branch of the Consumers' Association of Canada.
28. Milton Schwartzentruber,
29. Pastor Osiah Horst,
30. Pastor Don Snyder,
31. Emmerson McDowell,
The Mennonite Conference of Ontario.

OTTAWA

March 9, 1970.

32. W. C. R. Jones, President and Managing Director,
33. F. A. Cashman, Manager of Industrial Relations,
The E. B. Eddy Company Limited.
34. J. J. Norris, Sales and Operations Manager,
35. Jacie Horwitz, Q.C., Counsel,
R. A. Beamish Stores Company Limited.
36. F. H. Sherwood, President,
37. F. E. Lavoie, Past President,
38. M. Greenberg, Director,
39. Miss Jane McLean, Executive Director,
Ottawa Real Estate Board.

40. J. P. Nicol, Manager, Labour Relations Research,
41. I. E. Davidson, Manager, Cornwall Plant,
Domtar Limited.
42. Rev. Harold Davies, Chairman,
Renfrew Presbytery, United Church of Canada.
43. David R. Freeman.
44. Dr. John Wylie, Sr.
45. Dr. John Wylie, Jr.
46. Rev. Gordon Upton, President,
47. Dr. Carl Seidenspinner,
The Ottawa Evangelical Ministerium.
48. Dr. Russ Spangler, Jr.,
49. Ewen Macvarish,
50. George Brewer,
The Ottawa Seventh-day Adventist Church.
51. Miss Mary A. H. Bennett.
52. Lou Satov.

LONDON

March 16, 1970.

53. E. D. McGugan, General Manager,
Western Fair Association.
54. Professor James Rendall.
55. R. T. Saxby, President,
56. S. Goudie,
57. N. Burdick,
The Associated Stores of Canada (Ontario Members).
58. Ken Martin, President,
59. Henry Kobryn, Secretary Treasurer,
Provincial Building and Construction Trades Council of Ontario.
60. R. O. Beggs, Secretary-Manager,
The Sarnia and District Chamber of Commerce.
61. Mr. Emerson McVicar.
62. Mrs. Emerson McVicar.

March 17, 1970.

63. Rev. W. C. Tupling,

64. Rev. M. Di Stasi,

The Middlesex Presbytery of the United Church of Canada.

65. Arthur J. Lohead, President,

66. Thomas M. Ross, Executive-Director,

The Canadian Retail Hardware Association.

67. The Rev. Douglas E. W. Lennox, Pastor of Appin, Guthrie-Melbourne and Burns' Church, Mosa Township (Presbyterian Church in Canada).

68. Alan Wheable.

69. Edgar Hewitt.

70. Geoffrey Suckling.

71. John Allan Taylor.

72. Arthur Birnbaum.

SAULT STE. MARIE

March 31, 1970.

73. R. E. E. Costello, Senior Vice-President, Operations,

74. Ted Zeger, Manager, Abitibi Mill, Sault Ste. Marie,

The Abitibi Paper Company Limited.

75. Very Rev. Frank Nock, President,

76. Rev. Malcolm Morden, Secretary,

77. Rev. Andrius Kaellgren, Vice-President,

The Sault and District Ministerial Association.

78. Rev. Arthur R. Cragg, Minister, Central United Church, Sault Ste. Marie,

79. Miss Aileen Hadden,

80. E. S. Stevens,

Algoma Presbytery, United Church of Canada.

81. Mrs. S. Rathwell,

82. D. F. Robinson.

83. Harold Brain, Executive Director and Chairman of the Legislation Committee,

The Ontario Parks Association.

84. David M. Norman, Chairman, Provincial Affairs Committee,
85. Professor Albert Pyke, Algoma College,
Sault Ste. Marie Chamber of Commerce.
86. Morris Manchester.
87. Andrew Glibota, Chairman,
St. Gregory's Parish Council, St. Gregory's Church, Sault Ste. Marie.
88. Harold Wills,
Cochrane Public Library Board.
89. Rev. Duncan Macgregor,
First Baptist Church of Sault Ste. Marie.

HAMILTON

April 20, 1970.

90. B. A. Nevin,
91. J. Lang,
92. W. R. Young,
The Presbytery of Hamilton of the Presbyterian Church in Canada.
93. A. Mandy, General Manager,
The Hamilton Downtown Association.
94. Mrs. Harold Vrooman, President,
The Women's Interchurch Council of Hamilton.
95. Paul Eager, City Solicitor,
Corporation of the City of Hamilton.
96. Rev. William Rokeby,
97. Rev. Walter Davis,
98. Milford Murray,
The St. Catharines Clergy Fellowship.
99. Harry Baird.
100. Alderman George Morrow,
City of Hamilton.
101. Mrs. O. J. Clark, President,
102. Mrs. Thos. Smith, Chairman,
*Citizen and Social Action Committee, Hamilton Presbyterial
United Church Women of the United Church of Canada.*

- 103. Orville Thacker, President,
- 104. Donald E. Bott, Secretary,
The Kitchener & Waterloo District Labour Council.

April 21, 1970.

- 105. W. K. Voss, Vice-President, Manufacturing,
- 106. G. L. Cooper, Division Manager,
Ontario Paper Company Limited.
- 107. Edward G. Smith,
Elm Street United Church Men's Club, St. Catharines.
- 108. Brigadier C. R. Gillingham,
- 109. Brigadier Henry Burden,
The Salvation Army, Southern Ontario Division.
- 110. K. P. Marshall, Chairman,
- 111. C. A. Wilson,
- 112. M. S. Kernighan,
The Session of Knox Presbyterian Church, Milton, Ontario.
- 113. Henry Shanfield,
The Downtown Windsor Business Association.
- 114. Rev. E. W. Haase, Pastor,
Grace Lutheran Church, Hamilton.
- 115. Rev. Greg. P. Gregersen, Pastor,
Fairfield United Church, Hamilton.
- 116. Rev. Garbutt F. Smith,
- 117. Mrs. Helen Pearson,
- 118. Art. Rozell,
The Guelph Association of Baptist Churches.
- 119. Rev. Harry Mennega,
The Immanuel and Mount Hamilton Christian Reformed Churches of Hamilton.
- 120. Miss Barbara Marshall.
- 121. Miss Marlene Pierce.
- 122. Mrs. Robert Simmons, Executive Officer,
Hamilton Branch of the Consumers' Association of Canada.
- 123. Rev. P. K. Smith,
- 124. Rev. E. A. Cooper,
- 125. L. C. Whittaker,
Men's Fellowship Organization, Bethel Gospel Tabernacle.

126. Mrs. J. E. Clare.

TORONTO

April 27, 1970.

127. Rev. John F. G. Morris, Minister,
St. Andrew's United Church, Oshawa.

128. Fred M. Payne, Executive Vice-President,
129. Robert I. Pollock,
130. G. A. Moriarity,
131. Donald A. Zacher,
132. William A. Murray,
The Canadian Shoe Retailers' Association.

133. Mrs. Joe Newberry,
134. Mrs. Muriel Bishop,
*Toronto Monthly Meeting of the Religious Society of Friends
(Quakers).*

135. A. F. Sheppard, Q.C., Counsel,
Greater Niagara Chamber of Commerce.

136. Geoffrey Nathan, President,
137. Edmund West, Vice-President,
Radicals for Capitalism.

138. Rev. Jim Josse, Chairman,
139. Rev. Lawrence A. Ogden, Secretary,
Newmarket and District Ministerial Association.

140. D. L. Michael, Counsel,
Ontario-Quebec Conference of the Seventh-day Adventist Church.

141. Milton S. Carman, Executive Director,
The Ontario Council for the Arts.

142. F. Bridge, Personnel Department,
The Great Atlantic and Pacific Tea Company Limited.

143. Rev. Jack L. Hockney, Secretary-Treasurer,
144. Rev. R. Erickson, Chairman, Social Action Committee,
Associated Gospel Churches of Canada.

145. Helmut H. Kramer, Minister,
*Seventh-day Adventist Reformed Church, Eastern Canadian
Conference, Hamilton.*

April 28, 1970.

146. Peter C. Swann, Director,
Royal Ontario Museum.
147. J. W. Younger, Q.C., Counsel,
148. Rev. Dr. Wm. Fitch,
149. Rev. Earl Kulbeck,
150. Rev. Charles Tipp,
Evangelical Fellowship of Canada.
151. D. M. Woods, President,
152. Alan Dickenson, Vice-President of Finance,
Gordon Mackay and Company Limited.
153. James Rafuse,
H. C. Downham Limited, Strathroy, Ontario.
154. T. S. Jones, Vice-President and Divisional Manager,
Dryden Paper Company Limited.
155. J. G. Pink, Counsel,
156. Donald W. Hillhouse, Executive Vice-President,
157. A. R. Lang,
Laura Secord Candy Shops Limited.
158. Rev. F. L. Stone, Minister,
Bethel Baptist Church, 645 Millwood Road, Toronto.
159. The Right Rev. G. B. Snell, Bishop of Toronto, Anglican Church of Canada,
160. The Right Reverend L. S. Garnsworthy, Suffragan Bishop of Toronto, Anglican Church of Canada,
161. The Most Reverend P. F. Pocock, Coadjutor Archbishop of Toronto, Roman Catholic Archdiocese of Toronto,
Anglican and Roman Catholic Dioceses of Toronto.
162. Miss Ruth Strangways,
Unit 19 of the United Church Women of St. George's United Church, Toronto.
163. Rev. E. S. Bull,
164. Gerald Donnell,
Eastern Ontario Conference of the Free Methodist Church.
165. Rev. M. A. McDowell,
166. Rev. Harold K. Wright,
Kingston Presbytery of the United Churches of Canada.

April 29, 1970.

167. Sam Sable, Vice-Chairman,
168. Rabbi Dr. Rabinovitch,
169. B. G. Kayfetz, Executive Director, Joint Community Relations Committee,
170. Fred M. Catzman, Q.C., Chairman, Special Committee,
Canadian Jewish Congress (Central Region).
171. John C. Pallett, Q.C., Counsel,
172. Ross Indovina,
173. Joseph Indovina,
Dixie Fruit Market Limited and other independent retailers.
174. A. G. MacLachlan,
MacLachlan Lumber Company (Kingston) Limited.
175. P. S. A. Lamek, Counsel,
Ontario-Minnesota Pulp and Paper Company Limited.
176. Mrs. G. B. Armstrong, President,
177. Mrs. G. G. Henderson,
178. Brigadier E. Falle,
179. Miss L. D. Martin,
180. Mrs. J. A. Little,
The Provincial Council of Women of Ontario.
181. Ernest Craik, Secretary-Treasurer,
Kenora-Keewatin and District Labour Council.
182. A. Kelly, Vice-Chairman,
183. Norman F. Edwards,
184. J. W. Ritchie,
185. Peter Stevens, Executive Secretary,
Ontario Council of the National House Builders Association.
186. D. W. Grant, Vice-President,
187. Gerry Weinman,
Urban Development Institute.
188. Col. William F. Ross,
Salvation Army, Headquarters for Canada and Bermuda.
189. Paul Lee.
190. M. Goodbaum,
Sunnybrook Discount Food Markets Limited.
191. Rev. H. F. MacEwen,
Bible Presbyterian Church, Toronto, and The Canadian Council of Evangelical Protestant Churches, Toronto.

APPENDIX IX

THE FEDERAL LORD'S DAY ACT



CHAPTER 171.

An Act respecting the Lord's Day.

SHORT TITLE.

Short title **1.** This Act may be cited as the *Lord's Day Act*.
R.S., c. 123, s. 1.

INTERPRETATION.

- Definitions. **2.** In this Act,
- "Employer." (a) "employer" includes every person to whose orders or directions any other person is by his employment bound to conform;
- "Lord's Day." (b) "Lord's Day" means the period of time that begins at twelve o'clock on Saturday afternoon and ends at twelve o'clock on the following afternoon;
- "Performance." (c) "performance" includes any game, match, sport, contest, exhibition or entertainment;
- "Person." (d) "person" has the meaning that it has in the *Criminal Code*;
- "Provincial Act." (e) "provincial Act" means the charter of any municipality, or any public Act of any province, whether passed before or since Confederation;
- "Railway." (f) "railway" includes steam railway, electric railway, street railway and tramway; and
- "Vessel." (g) "vessel" includes any kind of vessel or boat used for conveying passengers or freight by water. R.S., c. 123, s. 2.

Dominion railways. **3.** (1) Nothing herein prevents the operation on the Lord's Day for passenger traffic by any railway company incorporated by or subject to the legislative authority of the Parliament of Canada of its railway where such operation is not otherwise prohibited.

Operation of provincial railways. (2) Nothing herein prevents the operation on the Lord's Day for passenger traffic of any railway subject to the legislative authority of any province, unless such railway is prohibited by provincial authority from so operating. R.S., c. 123, s. 3.

PROHIBITIONS.

4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour. R.S., c. 123, s. 4.

No sales to be made or business or work done on Lord's Day.

5. Except in cases of emergency, it is not lawful for any person to require any employee engaged in any work of receiving, transmitting or delivering telegraph or telephone messages, or in the work of any industrial process, or in connection with transportation, to do on the Lord's Day the usual work of his ordinary calling, unless such employee is allowed during the next six days of such week, twenty-four consecutive hours without labour. R.S., c. 123, s. 5.

Substitution of another holiday for the Lord's Day.

6. (1) It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

Games and performances where admission fee is charged.

(2) When any performance at which an admission fee or any other fee is so charged is provided in any building or place to which persons are conveyed for hire by the proprietors or managers of such performance or by any one acting as their agent or under their control, the charge for such conveyance shall be deemed an indirect payment of such fee within the meaning of this section. R.S., c. 123, s. 6.

Charges for conveyance to performance.

7. It is not lawful for any person on the Lord's Day, except as provided by any provincial Act or law now or hereafter in force, to run, conduct, or convey by any mode of conveyance any excursion on which passengers are conveyed for hire, and having for its principal or only object the carriage on that day of such passengers for amusement or pleasure, and passengers so conveyed shall not be deemed to be travellers within the meaning of this Act. R.S., c. 123, s. 7.

Excursions by conveyances where fee is charged.

8. (1) It is not lawful for any person to advertise in any manner whatsoever any performance or other thing prohibited by this Act.

Advertisements of prohibited performances, etc., wherever taking place.

(2) It is not lawful for any person to advertise in Canada in any manner whatsoever any performance or other thing that if given or done in Canada would be a violation of this Act. R.S., c. 123, s. 8.

Shooting.

9. It is not lawful for any person on the Lord's Day to shoot with or use any gun, rifle or other similar engine, either for gain, or in such a manner or in such places as to disturb other persons in attendance at public worship or in the observance of that day. R.S., c. 123, s. 9.

Sale of foreign newspapers on Sunday.

10. It is not lawful for any person to bring into Canada for sale or distribution, or to sell or distribute within Canada, on the Lord's Day, any foreign newspaper or publication classified as a newspaper. R.S., c. 123, s. 10.

WORKS OF NECESSITY AND MERCY EXCEPTED.

Works of necessity and mercy not prohibited.

11. Notwithstanding anything herein contained, any person may on the Lord's Day do any work of necessity or mercy, and for greater certainty, but not so as to restrict the ordinary meaning of the expression "work of necessity or mercy," it is hereby declared that it shall be deemed to include the following classes of work:

Divine worship.

(a) any necessary or customary work in connection with divine worship;

Relief of sickness.

(b) work for the relief of sickness and suffering, including the sale of drugs, medicines and surgical appliances by retail;

Telegraph and telephone.

(c) receiving, transmitting, or delivering telegraph or telephone messages;

Fires and repairs to any continuous industry.

(d) starting or maintaining fires, making repairs to furnaces and repairs in cases of emergency, and doing any other work, when such fires, repairs or work are essential to any industry or industrial process of such a continuous nature that it cannot be stopped without serious injury to such industry, or its product, or to the plant or property used in such process;

Fires, pumping, etc., in protection of life and property.

(e) starting or maintaining fires, and ventilating, pumping out and inspecting mines, when any such work is essential to the protection of property, life or health;

Continuous supply of light, heat, etc.

(f) any work without the doing of which on the Lord's Day, electric current, light, heat, cold air, water or gas cannot be continuously supplied for lawful purposes;

Conveying travellers.

(g) the conveying of travellers and work incidental thereto;

Trains and vessels in transit.

(h) the continuance to their destination of trains and vessels in transit when the Lord's Day begins, and work incidental thereto;

- (i) loading and unloading merchandise, at intermediate points, on or from passenger boats or passenger trains; Loading and unloading goods.
- (j) keeping railway tracks clear of snow or ice, making repairs in cases of emergency, or doing any other work of a like incidental character necessary to keep the lines and tracks open on the Lord's Day; Clearing snow and ice, repairs, etc., in case of railways.
- (k) work before six o'clock in the forenoon and after eight o'clock in the afternoon of yard crews in handling cars in railway yards; Work in railway yards.
- (l) loading, unloading and operating any ocean-going vessel that otherwise would be unduly delayed after her scheduled time of sailing, or any vessel that otherwise would be in imminent danger of being stopped by the closing of navigation; or loading or unloading before seven o'clock in the morning or after eight o'clock in the afternoon any grain, coal or ore-carrying vessel after the 15th of September; Loading and unloading vessels.
- (m) the caring for milk, cheese, and live animals, and the unloading of and caring for perishable products and live animals, arriving at any point during the Lord's Day; Milk, cheese and live animals.
- (n) the operation of any toll or drawbridge, or any ferry or boat authorized by competent authority to carry passengers on the Lord's Day; Working bridges and ferries.
- (o) the hiring of horses and carriages or small boats for the personal use of the hirer or his family for any purpose not prohibited by this Act; Hiring horses and boats.
- (p) any unavoidable work after six o'clock in the afternoon of the Lord's Day, in the preparation of the regular Monday morning edition of a daily newspaper; Newspapers.
- (q) the conveying Her Majesty's mails and work incidental thereto; Mail carrying.
- (r) the delivery of milk for domestic use, and the work of domestic servants and watchmen; Milk delivery.
- (s) the operation by any Canadian electric street railway company, whose line is interprovincial or international, of its cars, for passenger traffic, on the Lord's Day, on any line or branch that is, on the day of the coming into force of this Act, regularly so operated; Street railways.
- (t) work done by any person in the public service of Her Majesty while acting therein under any regulation or direction of any department of the Government; Public officers.
- (u) any unavoidable work by fishermen after six o'clock in the afternoon of the Lord's Day, in the taking of fish; Fishermen.
- (v) all operations connected with the making of maple sugar and maple syrup in the maple grove; Maple sugar.

- Saving property. (w) any unavoidable work on the Lord's Day to save property in cases of emergency, or where such property is in imminent danger of destruction or serious injury; and
- Work permitted by Transport Commissioners. (x) any work that the Board of Transport Commissioners for Canada, having regard to the object of this Act, and with the object of preventing undue delay, deems necessary to permit in connection with the freight traffic of any railway. R.S., c. 123, s. 11; 1938, c. 53, s. 3.

OFFENCES AND PENALTIES.

Violation of this Act. **12.** Any person who violates any of the provisions of this Act is for each offence liable, on summary conviction, to a fine, not less than one dollar and not exceeding forty dollars, together with the cost of prosecution. R.S., c. 123, s. 12.

Employer authorizing. **13.** Every employer who authorizes or directs anything to be done in violation of any provision of this Act, is for each offence liable, on summary conviction, to a fine not exceeding one hundred dollars and not less than twenty dollars, in addition to any other penalty prescribed by law for the same offence. R.S., c. 123, s. 13.

Corporation directing or permitting violation of this Act. **14.** Every corporation that authorizes, directs, or permits its employees to carry on any part of the business of such corporation in violation of any of the provisions of this Act, is liable, on summary conviction before two justices of the peace, for the first offence, to a penalty not exceeding two hundred and fifty dollars and not less than fifty dollars, and, for each subsequent offence, to a penalty not exceeding five hundred dollars and not less than one hundred dollars, in addition to any other penalty prescribed by law for the same offence. R.S., c. 123, s. 14.

PROCEDURE.

Provincial Lord's Day Acts not affected. **15.** Nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force; and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act or law, the offender may be proceeded against either under the provisions of this Act or under the provisions of any other Act or law applicable to the offence charged. R.S., c. 123, s. 15.

Leave to prosecute. **16.** No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney General, or his lawful deputy, for the province in which the offence is alleged to have been committed, nor after the expiration of sixty days from the time of the commission of the alleged offence. 1948, c. 58, s. 1.

Limitation.

APPENDIX X

THE LORD'S DAY (ONTARIO) ACT

CHAPTER 50

The Lord's Day (Ontario) Act, 1960-61

AS AMENDED: *The Lord's Day (Ontario) Amendment Act, 1965*
The Lord's Day (Ontario) Amendment Act, 1968

Assented to March 29th, 1961
Session Prorogued March 29th, 1961

HER MAJESTY, by and with the advice and consent of the legislative Assembly of the Province of Ontario, enacts as follows:

1.—(1) Where a by-law passed under this section is in force and subject to its provisions, it is lawful in the municipality or in such part or parts thereof as are specified in the by-law for any person, after 1.30 o'clock in the afternoon of the Lord's Day or during such period or periods of time after 1.30 o'clock in the afternoon of the Lord's Day as are specified in the by-law, to provide, engage in or be present at any public game or sport that is specified in the by-law and which but for this Act would be unlawful under section 6 of the *Lord's Day Act* (Canada), or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Act would be unlawful under section 4 of the *Lord's Day Act* (Canada). R.S.O. 1960, c. 225, s. 1, *amended*. ^{Sunday sports may be made lawful} ^{R.S.C. 1952, c. 171}

(2) The council of any city, town, village or township may pass a by-law, ^{Implementing by-law authorized}

- (a) providing that subsection 1 applies in the municipality or specifying a part or parts of the municipality in which subsection 1 applies;
- (b) providing that subsection 1 applies after 1.30 o'clock in the afternoon of the Lord's Day or specifying the period or periods of time after 1.30 o'clock in the afternoon of the Lord's Day during which subsection 1 applies; and
- (c) specifying the public games and sports to which subsection 1 applies.

(3) Any provision of a by-law under this section may differ in different parts of the municipality and in respect to different public games and sports. ^{Variation in by-law authorized}

Horse-
racing

(4) A by-law under this section shall not specify horse-racing as a public game or sport. R.S.O. 1960, c. 225, s. 2 (1-4), *amended*.

Municipality
defined

1a.—(1) In this section, “municipality” means a city, town, village or township and includes a metropolitan municipality but does not include a local municipality in a metropolitan municipality.

By-laws
authorized

(2) The council of a municipality may pass a by-law providing that this section applies in the municipality.

Horse
racing

(3) In every municipality in which a by-law passed under subsection 2 is in force, it is lawful for any person after 1.30 o'clock in the afternoon on the Lord's Day to provide, engage in or be present at a horse race that, but for this Act, would be unlawful under section 6 of the *Lord's Day Act* (Canada), or to do or engage any other person to do any work, business or labour in connection with any such horse race which, but for this Act, would be unlawful under section 4 or 6 of the *Lord's Day Act* (Canada).

R.S.C. 1952,
c. 171

Sunday
movies, etc.,
may be
made lawful

2.—(1) Where a by-law passed under this section is in force and subject to its provisions, it is lawful in the municipality or in such part or parts thereof as are specified in the by-law for any person, after 1.30 o'clock in the afternoon of the Lord's Day or during such period or periods of time after 1.30 o'clock in the afternoon of the Lord's Day as are specified in the by-law, to provide, engage in or be present at any exhibition of moving pictures or any theatrical performance, any concert or any lecture or such of them as are specified in the by-law and which but for this Act would be unlawful under section 6 of the *Lord's Day Act* (Canada), or to do or engage any other person to do any work, business or labour in connection with any such exhibition of moving pictures, theatrical performance, concert or lecture, as the case may be which but for this Act would be unlawful under section 4 of the *Lord's Day Act* (Canada).

R.S.C. 1952,
c. 171

Implement-
ing by-law
authorized

(2) The council of any city, town, village or township may pass a by-law,

- (a) providing that subsection 1 applies in the municipality or specifying a part or parts of the municipality in which subsection 1 applies;
- (b) providing that subsection 1 applies after 1.30 o'clock in the afternoon of the Lord's Day or specifying the period or periods of time after 1.30 o'clock in the afternoon of the Lord's Day during which subsection 1 applies; and

- (c) specifying that subsection 1 applies to the exhibition of moving pictures, theatrical performances, concerts and lectures or any one or more of them.

(3) Any provision of a by-law under this section may differ in different parts of the municipality and in respect of the exhibition of moving pictures, theatrical performances, concerts or lectures. Variation in by-law authorized

(Subsections 4, 5, 6, 7 repealed by *The Lord's Day (Ontario) Amendment Act, 1968.*)

(8) The expression "concert" in this section does not include a concert of an artistic and cultural nature that is governed by section 5. *New.* "Concert" defined

(Section 3 repealed by *The Lord's Day (Ontario) Act, 1968.*)

4.—(1) Every by-law under this Act shall provide for the regulation and control of the activities specified therein, and may provide for the regulation and control of any matter or thing in connection therewith. R.S.O. 1960, c. 225, s. 2 (6), *amended.* Regulation and control

(2) Part XXI of *The Municipal Act* applies to by-laws passed under subsection 1. Application of R.S.O. 1960, c. 249, Pt. XXI

5. It is lawful for any person after 1.30 o'clock in the afternoon of the Lord's Day to provide, engage in or be present at any concert, recital or other musical performance of an artistic and cultural nature produced by a non-profit organization at which an admission fee is charged and which but for this Act would be unlawful under section 6 of the *Lord's Day Act* (Canada), or to do or engage any other person to do any work, business or labour in connection with any such concert, recital or other musical performance which but for this Act would be unlawful under section 4 of the *Lord's Day Act* (Canada). R.S.O. 1960, c. 225, s. 6, *amended.* Sunday musical concerts lawful R.S.C. 1952, c. 171

5a.—(1) In this section, "municipality" means a city, town, village or township and includes a metropolitan municipality but does not include a local municipality in a metropolitan municipality. Municipality defined

(2) The council of a municipality may pass a by-law providing that this section applies in the municipality in respect of such exhibitions or shows referred to in clause *a* of subsection 3 and such activities referred to in clause *b* of subsection 3 as are specified in the by-law. By-laws authorized

Agricul-
tural,
horticul-
tural or
trade
exhibitions
or shows

(3) In every municipality in which a by-law passed under subsection 2 is in force, it is lawful for any person after 1.30 o'clock in the afternoon on the Lord's Day to provide, engage in or be present at,

R.S.O. 1960,
cc. 6, 11, 175

(a) any exhibition or show that is conducted by any society or association to which *The Agricultural Associations Act*, *The Agricultural Societies Act* or *The Horticultural Societies Act* applies or by any corporation incorporated without share capital by or under any special or general Act or at any trade show or scientific exhibition; and

(b) any activity provided or arranged for by such association, society or corporation in connection therewith,

R.S.C. 1952,
c. 171

specified in the by-law and that, but for this Act, would be unlawful under section 4, 6 or 7 of the *Lord's Day Act* (Canada), or to do or employ any other person to do any work, business or labour in connection with any such exhibition, show or activity that, but for this Act, would be unlawful under section 4, 6 or 7 of the *Lord's Day Act* (Canada).

When
daylight
saving time
in effect

6. If and so long as the time commonly observed in a municipality in which a by-law under this Act is in force or in which a concert, recital or other musical performance is produced under section 5 is one hour in advance of standard time, the times mentioned in this Act or in a by-law under this Act shall be reckoned in accordance with the time so commonly observed and not standard time. R.S.O. 1960, c. 225, s. 7, *amended*.

Subject to
R.S.O. 1960,
cc. 396, 342

7. This Act and any by-law passed thereunder are subject to *The Theatres Act* and *The Racing Commission Act* and to the regulations made thereunder.

Sunday
sports votes
heretofore
taken

8.—(1) Any vote taken or deemed to have been taken under the authority of a predecessor of this Act shall be deemed to have been taken under the authority of this Act.

Sunday
sports
by-laws
heretofore
passed:

(2) Any by-law passed under the authority of a predecessor of this Act shall be deemed to have been passed under the authority of this Act. *New*.

Sunday
movies
votes
heretofore
taken
R.S.O. 1960,
c. 249

9. The council of any city, town, village or township that has submitted, since the 1st day of November, 1960, a question to the electors as defined in *The Municipal Act* in substantially the same terms as the question set out in subsection 4 of section 2, whether or not the question contained a reference to lectures or to time, shall be deemed to have complied with such provision. *New*.

10. *The Lord's Day (Ontario) Act* is repealed.

R.S.O. 1960,
c. 225,
repealed

11. This Act comes into force on the day it receives Royal Assent.

Commence-
ment

12. This Act may be cited as *The Lord's Day (Ontario) Act*, Short title
1960-61.

